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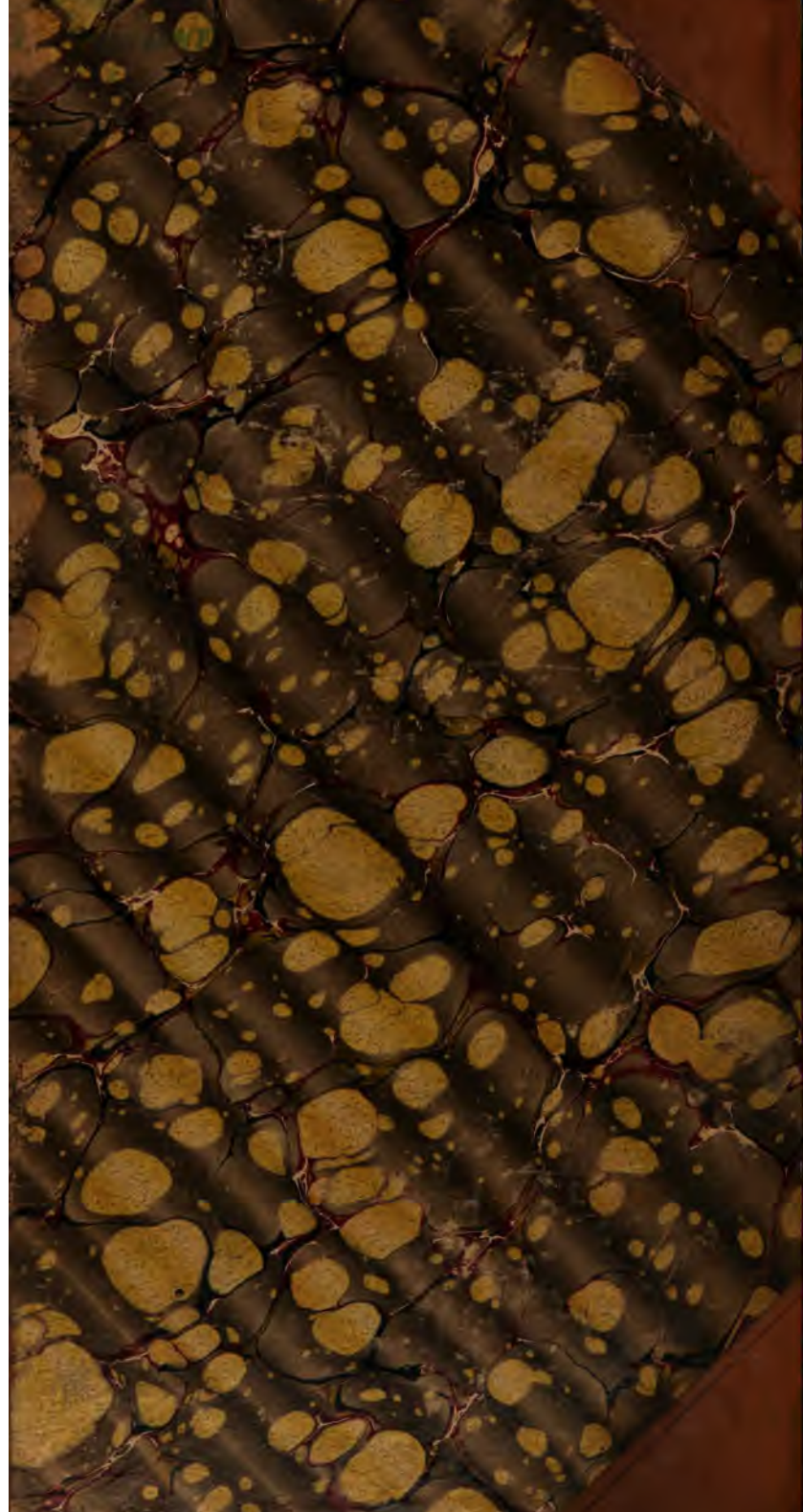
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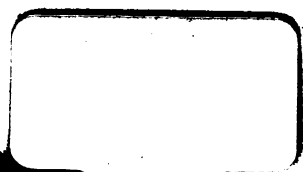
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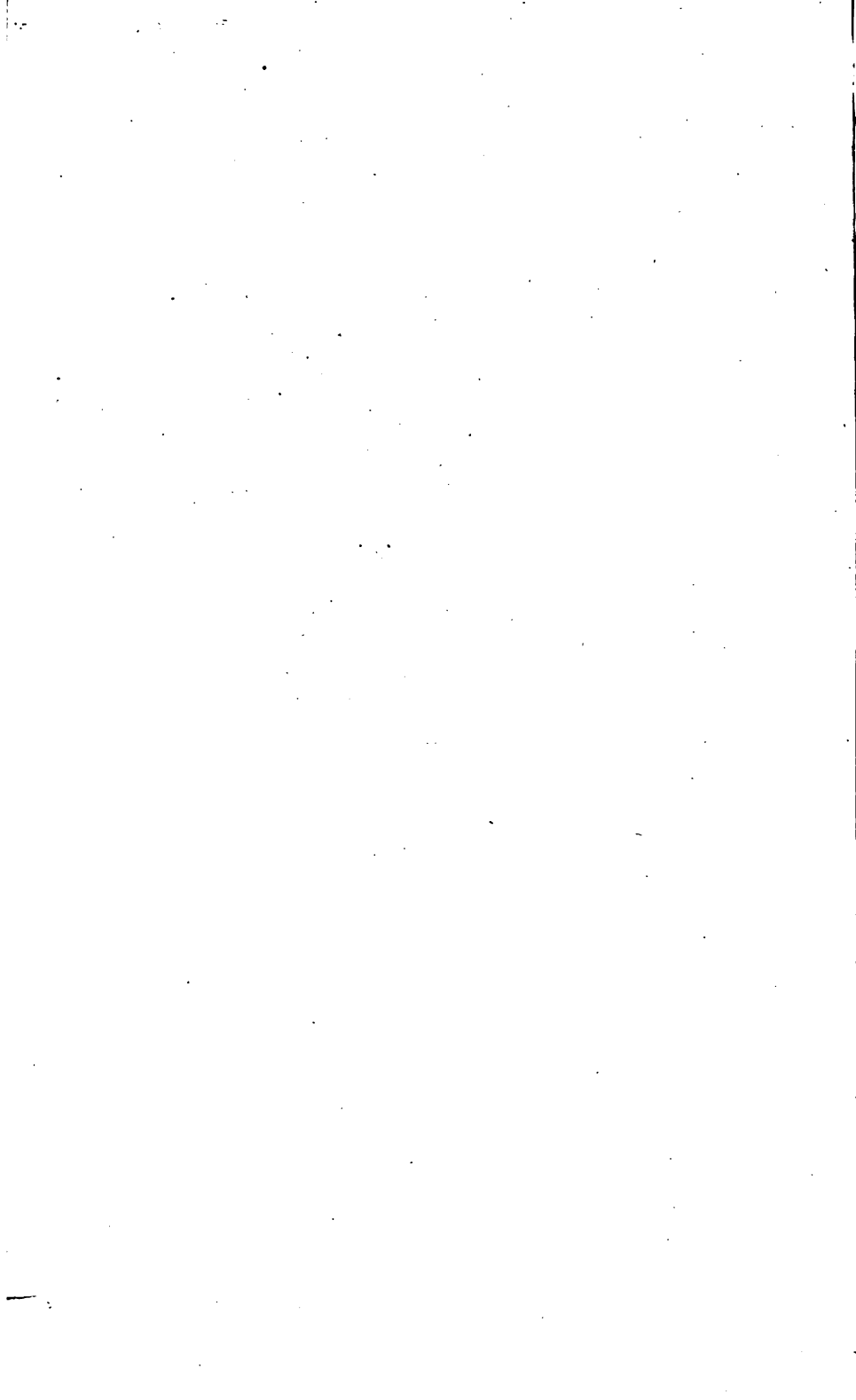
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# THE LAW MAGAZINE.

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## ART. I.—MILITARY LAW.

THE utmost reductions effected by successive ministries in our military establishments have left us, in the twentieth year of a peace, unexampled for its security, with a larger force than this country ever possessed (the late war excepted) at any former period. The unavoidable inference is, that no further reductions, to any material extent, can be made, with due regard to the general interests of the empire; that, in effect, a considerable standing army must henceforth be reckoned amongst our positive institutions. Whatever others may affect to believe, we certainly do not feel any alarm on this account. The time is gone by when the army could be effectually employed to further the designs of an arbitrary minister, even if its composition allowed the slightest apprehension that it would submit to be so used. The great characteristic of the British army, as distinguished from other armies, is its profound submission to the civil laws of the country, a submission inculcated in every part of its peculiar code, and recognized in every order emanating from the superior military authorities. "The English (says M. Dupin) have discovered the secret of constituting an army formidable to foreigners alone, and which considers obedience to the laws of the country a part of its glory." \* \* \* "Notwithstanding (he adds) the declamations of demagogues who seek to overturn the constitution, the citizens, the most jealous of their liberty, do not fear the English army. The officers possessing most influence, the most celebrated generals, however



great their services, or glorious their victories, are not more dangerous to liberty than the most obscure zealots." But independent of the disposition of the troops, their inconsiderable numbers as compared with the rest of the population, (the greater part being constantly employed in the colonies,) and their entire dependence on the popular branch of the legislature, not only for their maintenance but their legal existence, render all apprehension of danger to the constitution from that quarter to the last degree idle and absurd.

But though this be so, it is nevertheless desirable that the laws in force for the government of so important and singularly constituted a body as the army, or at least the principles on which these are based, should be more generally known than they confessedly are, even to those whose profession it is to make themselves acquainted with the laws affecting every class of the community. It must however be granted that the facilities for acquiring information on this subject, are not so numerous as those in most other departments of legal research. The few works which treat of the military law are confined to meagre details of the forms and procedure of courts-martial, and therefore little calculated to interest those who are not likely to become either amenable or assistant to such tribunals. To this remark the *Essay on Military Law* by the late Lord Woodhouslee is perhaps the only exception; but the omissions in the work, and the vast alterations since effected in the military code, render it a very inadequate authority on the subject. As to the notice bestowed on the military law by Blackstone, it is infinitely more calculated to mislead than instruct. He represents it as built upon no settled principles, and entirely arbitrary in its nature; and actually quotes Sir Matthew Hale to prove "that it is in truth and reality no law, but something indulged, rather than allowed as law," forgetting that what might perhaps be said with some truth by Sir Matthew Hale, who died many years before the Mutiny Act was in existence, was totally inapplicable after the first passing of that act in 1689, and its annual renewal up to the very year in which the learned judge was writing. He further informs us, that according to Sir Edward Coke, it is one of the marks of servitude, "to have the law which is our rule of action, either concealed or precari-

ous," "*misera est servitus ubi jus est vagum aut incognitum*," and thence takes occasion to deduce that the British soldiery are in a state of slavery in the midst of a nation of freemen! Had the learned judge looked into the Mutiny Act he would have seen, that not only the jurisdiction and powers of the military courts are accurately defined, but that the graver crimes, with the penalties attached to them, are distinctly specified, so as to leave nothing in such cases to the discretion of the Court, while those which do not admit of such exact definition, are left to the decision of judges sworn to decide according to evidence, and to known usage and custom. It should be recollected also, that the articles of war which embody the principal parts of the Mutiny Act, and may be considered as the substance of the military code, are read once in three months at the head of every corps. Will any one say that the mass of the people of this country have equal facilities for obtaining a knowledge of that Draconic code which it so much concerns them to know, and in relation to which the learned commentator, in another place, justly observes, "*ignorantia juris quod quisque tenetur scire neminem excusat*." These misrepresentations of this celebrated writer were very properly treated by Lord Loughborough, when presiding in the Common Pleas, on the occasion of a motion made in that Court, in behalf of Serjeant Grant, to obtain a prohibition against the execution of the sentence of a general court martial awarded against him. "Martial law," said his lordship, "such as it is described by Hale, and such also as it is marked by Sir William Blackstone, does not exist in England at all." He afterwards added, "that nothing is so dangerous to the civil establishment of the state, as a licentious and undisciplined army; and the object of the Mutiny Act therefore is to create a court invested with authority to try those who are a part of the army, in all their different descriptions."

We have made these remarks to show, that, however the military law may have been misrepresented by so great an authority, it is based upon settled principles and positive enactments, and has, in fact, precisely the same sanction as the other statutory laws of the realm. The subject has lately acquired a new interest, from the commission recently issued by the King, appointing several distinguished persons, civil as

well as military, "Commissioners for inquiry into the several modes of punishment now in use in the army, with a view of ascertaining what changes and ameliorations may be made therein, with a due regard to the maintenance of the discipline of the service." It is not, however, supposed that any alterations, which may be suggested by the commissioners, will extend to the constitution of the military courts, or the principles by which they are governed. What that constitution and those principles are we shall presently show, after briefly tracing the circumstances which led to the passing of the first Mutiny Act.

From the earliest period, the absolute command of the army appears to have been always vested in the sovereign. This undoubted right of the crown is stated, in the clearest and most unrestricted terms, in the preamble of the statute of the 13 & 14 Car. 2, which was passed for settling all disputes on this important subject,—the immediate cause of the first outbreak of the struggles in the preceding reign. The words of the preamble are, "Forasmuch as within all his majesty's realms and dominions, the sole and supreme power, government, command, and disposition of the militia, and of all the forces both by sea and land, and of all forts and places of strength is, and by the laws of England ever was, the undoubted right of his majesty and his predecessors, kings and queens of England, and that both, or either, of the houses of parliament cannot, and ought not to pretend to the same," &c. It was by virtue of the regal authority thus recognised, that James the Second drew up a military code, which was published in 1686, under the title of "The English Military Discipline printed by especial Command for the use of his Majesty's Forces." Many of the articles of that code were exceedingly judicious. Some are yet retained in the mutiny act; among them we may instance the mode of collecting the opinions of the members of courts-martial, which requires the junior officer to give his opinion first, the others following in that order, and the president last, in order to preserve the juniors from the influence of their superiors.

Upon the accession of William, it was found that the condition of Europe rendered the existence of a regular army absolutely indispensable,—a necessity which has never since

ceased to exist. Still the presence of such a force could not but be an object of great jealousy to the country. In the "Declaration of Rights" framed by the two houses, and solemnly assented to by the new sovereign, it was expressly stated that, "the raising and keeping of a standing army in time of peace, without consent of parliament, is contrary to law." It became therefore necessary to provide for this consent in the way not only least detrimental to the constitution, but most palatable to the people. Another difficulty arose from the statute of the 13 & 14 Car. 2, by which, as before mentioned, the supreme command and disposal of the military force were declared to be in the crown. Any attempt to limit or modify this authority would have been dangerous. The king's jealousy in such matters was well known, and his impatience had already been testified at the small number of troops proposed to be kept on foot. To have abridged his powers in this respect would perhaps have proved the readiest way to induce him to realize his frequent threat of retiring into Holland. The efficiency of the army, too, required that his paramount authority should remain untouched. Still the parliament, full of uneasy recollections, was reluctant to deprive itself of every check upon the exercise of so momentous a trust. To meet these various difficulties, it was proposed, that a bill should be passed authorizing the raising and maintaining a given number of troops, *for a specified time*, leaving them, *during that time*, at the entire disposal and command of the sovereign. By this plan, the prerogative of the crown would remain precisely as it is declared by the above statute, at the same time that the danger to be apprehended from so vast a power, would be sufficiently cared for, by rendering the maintenance of the army dependent upon the will of parliament, whenever the period for renewing the act should arrive; that thus, to use the quaint language of Whitlock, "though the king would have the power of the sword, the parliament would have that of the purse, so that they must both agree to draw the sword, or else leave it in the scabbard, which is the best place for it."

This was the origin of the first mutiny act, which was passed in 1689, and, with two or three interruptions, has been annually renewed ever since. The provisions of the act, ori-

ginally very confined, have been extended in succeeding acts, and others have been added, as they were from time to time required, by the increasing importance of our military establishments, and the course of legislative improvement. The mutiny act being in force only for a year, the provisions of each act, unless expressly retained in the succeeding one, necessarily become void by omission, though a clause is always inserted, by which offences against former acts are made cognizable by courts-martial, if prosecuted within three years from the time of their commission. We shall therefore confine our observations to the act as it now stands.

By the fourth section of the act, the king is empowered, "to make Articles of War for the better government of his majesty's forces, which articles shall be judiciously taken notice of by all judges and all courts whatsoever." This power, absolutely essential to the discipline and efficiency of the army, has been much objected to by those, who, besides losing sight of this important object, have paid no regard to the limits within which it is confined. In the first place, as it is restricted to "the better government of his majesty's forces," the operation of the articles is confined solely to military persons, and even in respect to them, provision is made, that no person "shall by such articles of war be subjected to be transported as a felon, or to suffer any punishment extending to life or limb, except for crimes which are by this act expressly made liable to such transportation, or to such punishment as aforesaid, nor to be punished in any manner, or under any regulations, which shall not accord with the provisions of this act." These restrictions, which take away the authority of the articles to impose *original* penalties in cases of capital and grave offences, reduce this power to that of enforcing order, by providing for those minor infractions of discipline, which, though too various and minute to come within the observation of the legislature, would, if unchecked, speedily demoralize the army, and render it the terror, instead of the safe-guard, of society. We suspect that many of the declaimers against this power in the crown, have been led into gross error, from the manner in which the articles have been usually framed. As they are generally regarded by military men as containing the substance of the military code, and as such are frequently

read to the troops, it has been usual to include in them all those offences which in the mutiny act are punished with death, transportation, or other great severity. These are punishments which, it will be recollected, can only be inflicted in the instances specified in the act; and by embodying the cases in the articles, the king is made apparently to assume a power, which in reality resides only in the legislature. But as the power of the king, as the head of the army, is undoubtedly very great, it will be as well to state to what it extends before proceeding further with our subject.

To the king, then, belongs the sole power of appointing all persons to commissions, or offices of trust and importance, in the army; and wherever any part of this power is usually exercised by persons holding certain offices, it is always expressed to be done in his name, except in the case of the appointments made by the Board of Ordnance. All promotions, honors, and rewards, proceed likewise from him, and in the advancement of individual officers, he is restricted neither by law, nor by the custom of the service, though, where no interference is exercised by him, the last is always supposed to hold good. So jealously is this prerogative preserved, that by the General Regulations and Orders published for the guidance of the army in 1822, any discussion of the merits and talents of officers appointed to commands, is strictly prohibited, "as being an assumption of power which belongs to the King alone, or to those officers to whom he may be pleased to intrust the command and discipline of his troops." As the King's authority to appoint and promote officers is thus unlimited, so is his authority to dismiss them from his service, whenever he chooses. All officers hold their commissions solely at his will, and may be deprived of them at pleasure, without the formality of a court-martial, or even reason assigned; and this, though they may have given large sums for their commissions. The case of Sir Robert Wilson is in point, and numerous other instances might be adduced.<sup>1</sup> So far this power, however at first sight objectionable, is, for reasons

<sup>1</sup> In the last century it was by no means unusual for an officer to be deprived of his commission upon grounds exclusively political. Pitt (the first Earl of Chatham) was deprived of his commission by Sir Robert Walpole, on account of the violence of his opposition to Sir Robert's ministry in parliament.—*Edit.*

which we have not space to detail, essential to maintain the character and efficiency of the army, provided it be always exercised under the responsibility of a particular minister,—but who this minister is, whether the First Lord of the Treasury, or the Secretary at War, does not appear to be ascertained. But a very objectionable extension of this power is the dismissal of officers, who have been actually tried by a court-martial, and either acquitted of the charges brought against them, or sentenced to a more lenient punishment. It is very true that this power is always exercised on the ground of the King's right to dismiss an officer when he pleases, and ostensibly without reference to the sentence of the court, which it is not competent to the crown to alter or reverse. It is contended, that no other punishment can be substituted for that affixed by the court; that the dismissal is not in such a case, a punishment, but a discretionary act of the crown, exercised for the benefit of the public. But a court-martial, like every other court, is always assumed to be instituted, not less for the protection of innocence, than for the punishment of guilt; and if an officer is, under cover of the prerogative, liable to be dismissed (a circumstance generally attended with utter ruin to the individual) for an offence of which he has been acquitted by a court, or for which he has been sentenced to some lenient punishment, it is difficult to conceive what protection he derives from such a tribunal. Unquestionably it would be better for the dignity of the crown, and the interests of justice, if this part of the prerogative were abandoned. It cannot, in fact, be exercised, without subjecting the sovereign to the unseemly suspicion of a personal feeling, and abrogating in effect the sacred rights of a court of justice. A more popular and more beneficial power, that of pardoning or remitting the sentences of courts-martial, in common with those of all criminal courts, is lodged in the crown. The pardon may be granted either simply or conditionally. By the latter mode, capital punishment is sometimes commuted for transportation, and sometimes, as in the frequent instance of deserters, to service for life in the colonies. The pardon is sometimes granted on the recommendation of the court, but the power of the King to grant one, either simple or conditional, is entirely unlimited, whether proceeding upon such recommendation or not.

We have already noticed the authority given by the Mutiny Act to the King to make articles of war "for the better government of his Majesty's forces." The last power which we shall enumerate, and the most important of all, is contained in the fifth section of the act, by which, in order to bring offenders against the said articles of war to justice, his Majesty is empowered "to erect and constitute courts-martial within the united kingdom of Great Britain and Ireland, as well as to grant his royal commissions or warrants to the chief Governor of Ireland, the Commander of the Forces, or the person or persons commanding in chief, or commanding for the time being any body of his Majesty's forces, as well within the united kingdom of Great Britain and Ireland, and the British Isles, as in any of his Majesty's dominions beyond sea, for the purpose of convening, as well as authorizing any officer under their command, not below the degree of a field officer, to convene, courts-martial for the trial of offences committed by any of the forces under their several command." As the offences cognizable by the military courts vary of course considerably in their nature and importance, it is necessary that some courts should be invested with higher powers, and more extensive jurisdiction, than the others. Accordingly there are four denominations of these courts, viz. general courts-martial, district or garrison courts-martial, detachment courts-martial, and regimental courts-martial. This last court, which is the most limited in its powers, must consist of officers of the same regiment, and is entirely of a domestic character, confining its attention to offences touching the discipline and interior economy of the regiment. Commissioned officers are not amenable to its authority. As the proceedings of general courts-martial alone possess matter of public interest, we shall confine the rest of this statement to the practice of those courts; premising that the principles by which they are governed are, for the most part, applicable to the inferior tribunals, though the forms of the latter are necessarily more simple.

A General Court-martial, if convened in the King's dominions (Bermuda, the Bahamas, Africa, and New South Wales, excepted), or in the Company's territories in India, must consist of not less than thirteen commissioned officers, including



the president. If convened in any of the places above excepted, where, from the dispersion of force, that number could hardly ever be assembled at any one place, it must consist of not less than five commissioned officers. In no case ought the officer, by whose authority the court is convened, to sit as president; nor must the president be under the degree of a field-officer, unless no officer of that rank is present; nor, in any case whatever, under the degree of a captain. Officers of the land and marine forces may be associated as members of the same court-martial, when the same rules are observed as if the court was composed of officers of the land forces only. The same holds in regard to the officers of the King's and Company's service in India, with this difference, that on the trial of any officer or soldier of the King's service, the provisions of the Mutiny Act must be observed; while on the trial of members of the Company's troops, recourse must be had to the provisions of the act passed in the 4th of George IV., for the punishment of mutiny and desertion in that service. This rule does not hold in regard to the militia; officers of the regular army being precluded from sitting as members of courts held for the trial of militia-men, and the officers of the latter being, in like manner, disqualified from sitting on those for the trial of officers and soldiers of the regular army. One invariable order of precedence is observed in these courts: the president sits at the head of the table, the senior member (in rank) on his right hand, the next on his left, and so on in succession. The president and each member of the court are individually sworn to "truly try and determine according to the evidence," and to administer justice according to the articles of war and the Mutiny Act, "without partiality, favour, or affection;" and if any doubt shall arise, "then, according to his conscience, the best of his understanding, and the custom of war in like cases." Each member is further sworn not to divulge the vote of any other member, unless called upon to do so "in a due course of law."

By the 14th section of the act, courts-martial are empowered to administer an oath to every person who shall be examined by them respecting the matters submitted to their decision. The form of the oath is: "The evidence you shall give before this court shall be the truth, the whole truth, and nothing

but the truth. So help you God." And all witnesses duly summoned, not attending such courts, or refusing to be sworn, or to give evidence, or to answer questions put to them by the court, are liable to attachment in the principal courts in London, Dublin, or Edinburgh, or in the King's dominions abroad, in the same manner as they would be if they had neglected to attend on a trial in any of those courts. The same freedom from arrest is also extended to the persons giving evidence before courts-martial, which is allowed to witnesses in the civil courts.

The jurisdiction of a General Court-martial, with respect both to persons and offences, is of a very extensive nature; there being scarcely any crime, committed by a military person, not cognizable by them. The Mutiny Act regards, as subject to such jurisdiction, every person, "who is or shall be commissioned, or in pay as an officer, or inlisted or in pay as a noncommissioned officer or soldier." Under this description, it seems officers on half pay are now included, though previously to 1786 they were exempt from such liability. Foreign troops in the king's pay, and those in the service of the company, while in the United Kingdom, and until their arrival in India, are also expressly included by the act. The militia, as well as all yeomanry and volunteer corps, are expressly exempted from its operation, except in cases, where, by any other acts for regulating those forces, the provisions of the mutiny act are specifically made applicable to them. It has been doubted, whether officers and soldiers retired from the service are amenable to courts-martial for offences committed during the time they were in the service, the terms of the mutiny act appearing to confine its application to those actually in commission or in pay. The better opinion, however, seems to be that they are so liable, if brought to trial within three years, the period within which all offences under the act must be prosecuted, dating from their commission. The case of Lord George Sackville is in point; that nobleman not having been brought to trial until three months after he had been deprived of his commission by the king. Indeed the question was referred to the judges, who declared "they saw no grounds to dispute the legality of the jurisdiction of a court-martial in those circumstances." There is a difficulty

in the case of members of parliament. It is however confined only to the arrest, the usual preliminary to bringing an officer to trial before a court-martial. It has been contended, that as they can only be arrested for treason, felony, or breaches of the peace, they are not liable to military arrest, except for offences coming under one of those descriptions. The privilege extends no further; for of their liability to all the penalties of the military law while in commission there can be no question. When a member of the house of commons has been convicted by a court martial, "of scandalous and disgraceful conduct," the house usually consults its own dignity, by expelling the offender, as was done in the case of Colonel J. F. Cawthorne, in 1796, by a majority of 108 to 12. Attempts were made in 1644 and 1749 to exempt the members of both houses from military jurisdiction, but it has long been settled, on the grounds of public justice and expediency, that so long as they continue to hold offices of rank and trust in the army, they shall be subject to its discipline. Besides the classes who act in a strictly military capacity, certain civilians, connected with the ordnance and commissariat departments, are, under peculiar circumstances, brought within the scope of the act; and it may be laid down as a general rule, that all followers of the army abroad, whether sutlers or others, are subject to military law, and liable to be tried and punished by military courts.

Although the most scrupulous care is taken to preserve inviolate the rights of the subject, by excluding every pretence for bringing civilians within the scope of military jurisdiction, yet they are liable to incur the penalties prescribed for certain offences by the mutiny act. Thus persons persuading soldiers to desert, may be punished by such fine and imprisonment, as the court in which they are convicted of the offence may award. And persons assisting or concealing deserters "shall forfeit for every such offence the sum of 20*l*." Penalties are also enacted against all persons buying the arms, or any part of the clothing and equipment of soldiers; or who shall engage in any unlawful recruiting; or, not being authorized military agents, shall traffic in the sale and exchange of commissions. But these enactments so necessary to protect the

interests of the service, by no means entrench on the civil rights of the subject, for the penalties can be enforced or recovered only in the civil courts.

Every general court-martial is attended by an officer styled the judge advocate, who prosecutes in the name of the king. In that respect, his functions resemble those of the attorney general in the civil courts. He has however others of a very different and most important nature. Not only is it his duty to inform the court of the necessary forms to be observed in their proceedings, but he ought also to explain to them the common law upon all those points where the Mutiny Act and the articles of war are silent: as in such cases the rules of the Common Law must be resorted to, nothing less than a positive enactment being capable of superseding them. Thus, he is peculiarly called upon to assist them with his advice in all points regarding evidence, and the distinctions between principals and accessaries; for little notice being taken of these subjects in the Mutiny Act, the decisions of the civil courts must of course be followed. To advise however is all he can do, for the decision must in every case be made by the court. The judge advocate is also considered as the adviser of the prisoner, not that he is expected to assist him with the zeal of a counsel, with which his duty as a prosecutor would be utterly incompatible, but in seeing that no evidence illegal in its nature or form is urged against him, and that he is not debarred the means of making a full and fair defence. He also acts as the recorder of the court, taking down the whole of the evidence in writing, and, as nearly as may be, in the words of the witnesses. When the proceedings of the court are concluded, it is his duty to transmit an accurate detail of them, including the finding and sentence of the court, to the office of the judge advocate general in London. It is evident that the duties of this functionary must be often of a very difficult nature, and such as to require not only a general, but in many instances an accurate knowledge of the common law. At home, the judge advocate general is usually a lawyer of eminence; but, except in very important cases, his place is supplied by a deputy. On foreign service, this duty is discharged by a military officer, selected for his knowledge and intelligence. It should be observed, that when the court persists in its adoption of any

course, against the advice of the judge advocate, the latter, though not entitled to enter his dissent in the form of a protest, is at liberty to engross upon the proceedings of the court the opinion delivered by him on the controverted point; and this as well for his own justification, as to bring the matter within the notice of the authorities, with whom it lies to confirm or remit the sentence.

Although the prisoner is allowed the assistance of counsel, yet by the practice of the courts, that assistance is very much restricted. The counsel may examine witnesses for the defence, and cross examine those for the prosecution, but he is not permitted to enter into any argument, or take objections to the proceedings of the court, though undoubtedly he may suggest them to his client. Still less is he permitted to address the court on the defence; and to so great a point is this jealousy of his interference carried, that though the court will allow a non-legal friend, particularly a military man, to read a defence for the prisoner, yet it will not grant that liberty to counsel. It would add to the high character which the military courts possess for strict impartiality, if these restrictions were removed. When we consider that men of very little or no education are often placed as prisoners, though perfectly innocent of the crimes laid to their charge, in situations which embarrass and perplex even men of cultivated understandings, it seems as cruel as it is needless to deprive them of the aid of those, who by their exercised skill in disrobing facts of appearances which do not belong to them, and dissevering them from others with which they have no essential connection, may often prevent that most deplorable of all the consequences of human fallibility, the condemnation and punishment of the innocent.<sup>1</sup> We hope it is not yet too late to extend the benefit of the bill now pending for allowing the assistance of counsel to prisoners, to persons liable to trial by courts-martial.

When it is intended to bring an officer or soldier to trial before a general court-martial, the usual course is to place the individual, if an officer, under arrest, if a soldier, in confinement. An officer under arrest (unless it be *close* arrest, which prohibits him from quitting his room,) is permitted to

<sup>1</sup> This opinion must be taken as the individual opinion of the writer.—*Edit.*

take exercise within the limits of the garrison or fort in which he may be quartered. The arrest is communicated to him by the adjutant, to whom he delivers his sword, which he is on no account permitted to wear while the arrest continues. An officer however cannot be kept in arrest, nor a soldier in confinement, beyond eight days, unless there is no possibility of assembling the number of members requisite to constitute a court within that time, in which case the arrest or confinement may be continued till the court can be convened. An officer who may have been placed in arrest cannot of right demand a court-martial, nor persist in considering himself under arrest, after he has been released from it by the proper authority. If he conceives the arrest has been wrongfully imposed, the proper course for him to obtain redress, is to complain to the commander in chief of the army, who is, by the 120th article of war, required to examine into the complaint, and to report upon it to his majesty, in order to receive his directions on the subject. But the request of an officer who conceives his professional character depreciated by the prevalence of unfounded or distorted representations, to have his conduct investigated by a court-martial, is not unfrequently complied with, as being at once a measure of justice to the individual, and of advantage to the service.

That the accused may be enabled to prepare for his defence, and advise with his counsel on matters pertaining to the trial, it is the duty of the judge advocate to furnish him with a copy of the charges intended to be brought against him. The charges may be considered as the indictment, and though it is not necessary that they should be worded with the technical nicety required in civil courts, they must nevertheless be sufficiently distinct and specific to answer the purposes of substantial justice. Thus it is not sufficient that the prisoner is charged with mutiny or insubordination: the precise acts on which the charge is grounded must be clearly stated, that he may have full opportunity of rebutting them. In general, the time and place must be stated, but where the offence charged is an omission or a non-feasance, this is not necessary. This specification is the more necessary, as by the 32nd article of war, "any officer convicted before a court-martial of behaving in a scandalous infamous manner, unbecoming the character of an officer and a gentleman, shall be cashiered."

It is obvious on a charge so general, and capable of being inferred from a vast variety of facts on which great contrariety of opinion may exist, with respect to the nature and degree of blame involved by them, much injustice would frequently be perpetrated, unless the acts supposed by the prosecutor to warrant such a charge were distinctly set forth. Accordingly, in the old articles of war, provision was made for that purpose; and though the clause is now discontinued, the spirit of it is still acted upon. In the general orders issued to the army on the trial of Ensign Imlach, (3rd West India Regiment,) it is directed that, "in every charge against an officer for scandalous or unbecoming behaviour, the fact or facts whereon the same is grounded shall be clearly specified." Without such specification, it is most probable the court would at this day throw out the charge altogether. The charge must further state the name, rank, and corps of the prisoner at full length; and the act or acts must be pointedly alleged to have been committed by him. The offence must also be in breach of some article of war, and it is generally so expressed in the charge, though such expression is not absolutely essential. Contrary to the rules of the civil courts, a prisoner may be arraigned before a court-martial for different crimes at the same time, but they must all be severally set forth in distinct counts. Thus an officer may be arraigned in one count, for being absent from his corps without leave; in another, for writing disrespectful letters to his commanding officer; and in a third, for disobedience of orders, the act of disobedience being specified.

Courts-martial, like Courts of civil judicature, are, during trial, open to the public, except when the court is engaged in determining some controverted point, as the admission of certain evidence, or in finding a verdict, and passing sentence, when their deliberations are carried on with closed doors. That there may be no suspicion of any improper selection, or packing, of the court, the members are taken in rotation from the camp or garrison in which the court is held. The usual mode is for the Brigade Major to indicate, in general orders, the number of officers of each rank to be furnished by each regiment, according as they stand on his roster; and the individual officers are then named by the adjutant of each regi-

ment, as they stand next for that duty. As a further security for the impartial administration of justice, the right of challenging the members is allowed to the accused, though of course not to the extent conceded in the civil courts, as from the limited number of individuals qualified to sit on courts-martial, the right of peremptory challenge might occasion great inconvenience, and, at times, a total failure of justice. The prisoner must therefore assign the cause of his challenge, and of its sufficiency the court is the judge. The most common causes of challenge are, suspicion of prejudice, hostile or unfriendly feeling manifested at any previous time towards the prisoner, whether by word or deed, and alleged pre-judgment of the case. The last cause may very well be assigned, if the member objected to has been a member of another court-martial, by which the matters to be submitted to the present court were either incidentally or directly discussed. Sometimes it happens that a court of inquiry has previously been held to ascertain whether any necessity existed for holding a court-martial; and it is upon the report of the court of inquiry that such grounds do exist, that a court martial is instituted. In such a case, the prisoner would of course be justified in challenging any member who had sat upon the court of inquiry. Any expression of opinion unfavourable to the prisoner is also a sufficient cause to sustain a challenge. In the case of an officer tried at Gibraltar for killing another in a duel, the prisoner challenged two members of the court, on the grounds that one of them had been in conference with a witness, and the other had declared that he, the prisoner, was deserving of death. Both challenges were allowed, and the members in question were replaced by the two officers next in rotation for that duty. It is not the practice to challenge after the members have been sworn; still, if in the course of trial, a proper cause of challenge became for the first time known to the prisoner, which it was not likely he should have had any knowledge of before, it is conceived that his right, if insisted upon, would not be disputed.

Several special pleas in bar of trial may be pleaded in a court-martial: such as a former trial for the same offence, a pardon either full or conditional, and want of sufficient specification in the charges. If the prisoner stands mute, or re-



fuses to plead, the court may at once convict him of the charges, and proceed to sentence, as was done in 1811, by a court-martial, held at Jamaica, on Captain John M'Intyre, of the 7th West India Regiment, who being arraigned on various extraordinary charges, stood mute and refused to plead. He was sentenced to be cashiered, and declared unworthy of ever serving his Majesty in any military capacity. But the better way now would certainly be for the court to enter a plea of not guilty, under the statute of 7 & 8 Geo. 4, c. 28. The plea of a former trial is grounded on the 16th sect. of the Mutiny Act, which declares that no person "acquitted or convicted of any offence shall be liable to be tried a second time for the same offence." The words, "acquitted or convicted," require that the trial should have been complete, for if, for any reason, the court had been dissolved without recording a conviction or acquittal, it seems that this plea would not hold. Effluxion of time is another plea, which may be urged in bar of trial; the Mutiny Act providing that no person shall be liable to be tried for any offence committed more than three years before the issuing of the warrant for trial, unless, by reason of his absence, or some other impediment, he shall not have been amenable to justice within that period. In the latter case, the liability to be tried is extended to two years after the impediment has ceased. Objections may also be sometimes taken to the jurisdiction of the court, as in the case of an offence properly cognizable in the civil courts. It would also be a fatal objection to the jurisdiction of the court, that it was not composed of the proper number of members, or that they were not of the rank required by the Mutiny Act. The pleas of "guilty" and "not guilty," have the same effect as in the civil courts. The prisoner is generally persuaded to plead the latter, but if he will persist in pleading the former, it is the course of the court to proceed immediately to sentence.

Before entering on the examination of witnesses, it is usual for the Judge Advocate to state briefly to the court the circumstances which led to the trial, and to show the criminal nature of the offences charged upon the prisoner. He then examines the witnesses for the prosecution, who are afterwards cross-examined by the prisoner, or his counsel. When

the cross-examination of each witness is finished, the court may put to him any question it pleases, either to explain the evidence he has already given, or to obtain information on points which the prosecutor has altogether omitted or only slightly touched upon. The evidence of each witness is taken down in writing by the Judge Advocate, who afterwards reads it over to him, that he may say whether it is correct or not, and make such alterations as he pleases. Every alteration, however, must be made by addition, and not by erasure. Even when a question is not permitted by the court to be asked, either by the prosecutor or the prisoner, the question must appear on the proceedings. All witnesses must be examined apart, and proof that any witness had remained in court while another was giving his evidence, would disqualify him as a witness, if either the prosecutor or prisoner chose to insist upon the point. The examination of the witnesses for the defence is conducted in the same manner as that for the prosecution. When the whole of the evidence is closed, the prisoner may request a reasonable time to prepare his defence, an indulgence which is usually granted.

Courts martial are, in general, guided by the rules laid down in the civil courts respecting the nature and admissibility of evidence. There are, however, a few peculiarities deserving of notice. The prosecutor, for instance, is permitted to give evidence in support of his own charges. Thus Sir William Draper, the accomplished antagonist of Junius, was allowed to be a witness on the trial of General Murray, notwithstanding his character as prosecutor, and that the particular charge, in support of which his evidence was given, was a personal wrong done to himself. Many other cases to the same effect might be cited, nor indeed is the practice so reprehensible as persons unacquainted with the nature of military duties might suppose. It is also in analogy to the practice of the criminal courts. If the prisoner, in his defence, impeach the credibility of the prosecutor's witnesses, the prosecutor may support their character by fresh evidence. And if the prisoner adduce any new and relevant matter, not touched by the evidence of the prosecution, the prosecutor may examine new witnesses upon the points so brought forward. Thus, suppose an officer charged with disobedience of

orders, and that the charge is distinctly proved, he might still be able to show, especially amidst the numerous contingencies of active service, that obedience to the order was impossible, or at all events that the interest of the service was so far consulted by the line of conduct he had adopted, as to justify the disobedience. If this mode of defence had not been foreseen by the prosecutor, it is clear that the evidence would not touch upon the new matter brought into discussion, and he would therefore be at liberty to meet it with such evidence as he could produce. Of course the prisoner would be allowed, in turn, to reply to this fresh evidence. By the 78th section of the Mutiny Act, all persons, whether civil or military, convicted of false swearing before a court-martial, are liable to the penalties for perjury.

In the conduct of his defence, the prisoner is allowed the greatest latitude consistent with the dignity of the court and the rights of others. However injudicious may be the nature of the defence, the court cannot refuse to hear it, or the evidence adduced in support of it, merely on the ground of its uselessness, or of its irrelevancy to the charge. On the trial of Lieutenant Dawson of the Royal Artillery, in 1823, at Malta, for refusing to fire certain salutes, according to the orders transmitted to him, the court interrupted his defence, and prohibited him from reading certain extracts from the Homilies, on the ground that they were irrelevant to the offence with which he was charged. The circumstances of the case were these. It had been customary for the government, on the requisition of the Roman Catholic priests, to order the British artillery to fire salutes on the festivals of certain saints. Lieutenant Dawson was in command of Fort St. Angelo, and an order was sent to him from the Adjutant General, to fire a salute at a stated hour "in honour of Saint Lorenzo," and to toll the castle bell, taking his time for firing from the tolling of the bell in the church of Saint Lorenzo. The lieutenant, who was a person of strict religious principles, conceived that this order was an utter violation of his rights as a Protestant, and that he could not legally be required to obey it. He accordingly stated his objections on that subject by letter to the Adjutant General, and requested to be exonerated from duties so repugnant to his feelings. This request was in consequence made known to the general

officer in command, (the late Sir Manly Power,) who refused to accede to it, and said, that if Lieutenant Dawson disobeyed the order, he would do so at his peril. That officer, however, persisted in declining either to fire the salute, or toll the bell, and the duty was eventually performed by another officer. For this conduct, he was some time after brought to trial, "For disobedience of orders, in hesitating and refusing to fire a salute, &c." The prosecutor, in his address, insisted that the question was one merely of obedience or disobedience, and trusted that the court would not allow the prisoner to connect it with religion or any other irrelevant matter. That this was a very insidious and unfair way of treating the subject, there can be no question. It was evident that the prisoner had acted solely from religious scruples, and to say that the court would not permit the discussion of any religious matter, as being foreign to the charge, was, in effect, to preclude him from making any defence at all. The terms of the order too clearly showed that the duties imposed were partly of a religious character, for the salutes were to be fired, and the bell tolled, "in honour of Saint Lorenzo." The court, however, adopted the views of the prosecutor, and when the prisoner, in the course of his defence, proceeded to read certain extracts from the Homilies, respecting the honours and worship paid to saints and images, as showing the acknowledged doctrine of the legally established church on the subject, he was stopped by the court, on the ground of irrelevancy. Upon the prisoner's declining to make any further defence if the extracts were not received, the court so far abated its rigour, as to say, he might name the books, and the passages he was desirous of quoting, but they would not suffer him to read the extracts, or comment upon them. Of this permission also Lieutenant Dawson refused to avail himself, and desired it might be recorded upon the proceedings that he made no defence. The court thereupon, after adverting in the proceedings upon "the prisoner's obstinacy," proceeded to judgment, and sentenced him to be dismissed the service. Upon the arrival of the proceedings of the court in England, whither they were sent for approval, (as must always be done in cases where commissioned officers are sentenced to suffer death or to be dismissed,) the Judge Advocate General (Sir John

Beckett,) seeing the gross impropriety of which the court had been guilty, immediately sent back the papers to Malta, with the Commander-in-Chief's orders that the court should re-assemble and revise its proceedings. It was pointed out to the court, by Sir John Beckett, that the prisoner could not be precluded from insisting upon topics, merely because the court judged them irrelevant; that if the line of defence adopted by him was injudicious, it was so to his own harm, but the court was not justified in refusing to hear the whole, or any part of his address, unless it contained matter or language of a treasonable nature, or disrespectful to the court; that the prisoner had a right to read the extracts, and to comment upon them, for the purpose of showing their applicability to his case, and that he was not obliged to content himself with merely referring the members of the court to books which they might perhaps never take the trouble of reading at all. The court, in consequence, admitted the whole of the prisoner's defence, but made no alteration in its decision.

To resume our account of the practice of the court—After the evidence for the prosecution and the defence has been closed, as well as the addresses of the prosecutor and the prisoner, the court proceeds to return a verdict, declaring the innocence or guilt of the accused. This part of its functions the court performs always with closed doors, and all persons, not members, except the Judge Advocate, are ordered to withdraw. The whole of the proceedings are then read to the court by the Judge Advocate, that, at this critical moment, the members may have a connected view of the entire body of the evidence. The decision of the court is declared by a majority of votes; and when the merits of the case have been discussed, and the President conceives the minds of the members are made up, he desires the Judge Advocate to put the question of guilty or not guilty. The question is put to the junior member (in rank) first, and so upwards to the President, who gives his vote last; the answer of each individual being taken down by the Judge Advocate in writing. The votes are then counted, and the verdict is given accordingly. If, as frequently happens, the prisoner is tried on several charges, this form is repeated for each charge. The finding may be special, and a prisoner may be acquitted of part

of a charge, and found guilty of the remainder. Where the usual number of officers to constitute a court can be obtained, the members and President make up an uneven number, so that there is always a majority for conviction or acquittal; but where from necessity, the number is even, there may be an equal division of votes. In this event, it is contended by some, that the President has the casting vote, and by others, that the equality is in favour of the prisoner, and amounts to an acquittal. Whatever be the real state of the law, the more humane opinion prevails in the practice of the courts.

If a verdict of acquittal has been found, the duties of the court (except in cases of revision) are at an end; but if the prisoner has been found guilty of the whole or any part of the charges, the court proceeds to award the punishment, (where it is not expressly specified by the Mutiny Act or Articles of War), which is determined, both as to its nature and degree, by the same order of voting as was observed in declaring the verdict. It was formerly doubted, whether those members who had voted in the minority for an acquittal, could have any vote in awarding the punishment. Those who held they could not, affirmed there was a gross inconsistency in a member's awarding even the slightest punishment to a man whom he had pronounced innocent. It was answered on the other hand, that the prisoner benefited by their votes, which detracted from the severity of the others. To this it has been replied, that the majority who voted for his guilt, being aware of this circumstance, would increase the amount of punishment in proportion as they anticipated such a diminution from the effect of the opposite votes. This objection infers a savage desire of inflicting punishment, which, we trust, rarely exists; nor does it accord with the oath taken by the members, to award simply the punishment proportioned to the crime. The practice of the service certainly is, for all the members to vote, nor do we think it open to objection, and undoubtedly it is in favour of humanity.

The punishments which it is competent to a court-martial to inflict, are, in the case of commissioned officers, confined by the Mutiny Act, the Articles of War, and the custom of the service, to the following:—death, transportation, imprison-

ment, dismissal from the service with incapacity to serve again, cashiering, simple dismissal, loss of rank, and reprimand, public or private. Those applicable to soldiers are,—death, transportation, corporeal punishment, imprisonment with or without hard labour, forfeiture of additional pay whilst serving, and of pension on being discharged.

Although a simple majority is sufficient to convict a prisoner of a crime punishable by death, yet that punishment cannot be inflicted, except with the concurrence of two-thirds of the members of the court. By this admirable regulation, sufficient assurance seems to be given, that the last sentence of the law shall not be passed where it is not clearly merited, at the same time that the inconvenient and absurd custom of requiring the concurrence of all the jurors in a trial by jury is avoided. Capital punishment is rarely resorted to in the British army, except on active service. During the Peninsular war it became necessary to inflict it oftener than had been usual, to repress the crimes of desertion and plundering, which had become more frequent from the example of the foreign soldiers introduced into our ranks. The only crime for which death is now peremptorily awarded by the Mutiny Act, is that of a convicted person's returning surreptitiously from transportation before the term of his punishment is expired. In this case, the court has no discretion, and the sentence of death follows of course upon conviction. Formerly, the offence of forging a safe-guard stood upon the same footing, but now, though still punishable with death, it is, with most other crimes liable to that penalty, brought within the discretion of the court, by the usual formula of denouncing punishment in the act, viz. that "the offender shall suffer death or such other punishment as by a general court-martial shall be awarded." There are, too, certain offences for which commissioned officers convicted thereof before a court-martial must be cashiered, the court having no authority to pronounce any other penalty. These offences, as specified in the Articles of War, are,—speaking disrespectful words of any member of the royal family; conniving at desertion; being drunk on duty; breaking an arrest; sending a flag of truce without due authority; giving a wrong watch-word; creating unnecessary

alarm by reports; using<sup>1</sup> desponding words on going into action; causing injurious effects to the service by unauthorized<sup>2</sup> communications; leaving the ranks to secure prisoners or horses, without leave; suffering himself to be taken prisoner from want of due precaution; appropriating to private use public supplies; behaving in a scandalous and infamous manner; conniving at the exactions of sutlers, or taking any fee for suffering persons to sell provisions within the command; impeding the civil magistrate, or refusing to assist him in arresting an officer or soldier; impeding the Provost Marshal, or refusing to assist him; refusing to obey any other officer, though of inferior rank, who shall order him into arrest, when concerned in any fray or challenge; demanding billets for more than the number of men, or taking money for freeing from billets; lastly, protecting a person from his creditors,<sup>3</sup> under pretence of his being a soldier, such not being the case. To this we should add, that in two instances, officers may be cashiered through the medium of the civil power. By the second section of the Mutiny Act, officers impeding or refusing to assist the civil magistrate in apprehending any officer or soldier, who has committed any violence against the person or property of any of his Majesty's subjects, shall, upon conviction thereof in any court of record at Westminster, Dublin, or Edinburgh, "be deemed to be *ipso facto* cashiered, and be utterly disabled to hold any civil or military employment in his Majesty's service." And by the 64th section of the act, the same penalties are denounced against any officer taking

<sup>1</sup> One of the charges against Lieut.-Colonel the Honourable Thomas Mullins, of the 44th regiment, was for saying, when told that his regiment was destined to carry the fascines in the attack on New Orleans, "It is a forlorn hope, and the regiment is sacrificed."

<sup>2</sup> This clause was added in consequence of the communications made by officers during the war to the English newspapers, from which the enemy often derived information respecting the strength, position, &c., of the army. Lord Wellington published a very strong order on this subject.

<sup>3</sup> By the third section of the act no soldier can be arrested and taken from his corps for any debt which does not exceed £30, over and above all costs of suit, and any soldier arrested for a debt under that sum, shall, on complaint to any judge of the court out of which the process has issued, be allowed such costs as the judge may think reasonable. As the words of the clause are "any person enlisted as a soldier," it would appear that commissioned officers are not within it; in Scotland, however, it has been determined otherwise.



upon himself to quarter soldiers, otherwise than is by law allowed, or using any menace or compulsion to magistrates, or constables, to induce them to act contrary to their duty, on conviction thereof "before any two or more justices of the county, by the oaths of two credible witnesses." It is to be observed, that a court-martial cannot award two punishments quite distinct in their nature, for the same offence. Thus an officer sentenced to be placed at the bottom of the list of his rank, cannot also be imprisoned; nor can a soldier be imprisoned, to whom corporeal punishment is awarded. Though an officer cannot be tried twice by a court-martial for the same offence, yet he is still amenable to such a tribunal for an offence for which he has been tried by a civil court, and that whether acquitted or convicted; but if found guilty, he can be punished only by cashiering. This power of bringing an officer to trial, although he may have been acquitted of the offence by a civil court, is necessary to maintain the high character of the army. A delinquent is often acquitted by a civil court, through the omission of some necessary formality, although his guilt may be perfectly notorious; and it would be a hardship upon the service, to say that such an acquittal should preclude any further inquiry: at the same time the individual is in a measure protected from the vindictive feelings of disappointed authority, by limiting the power of the military court to cashiering. To preserve accused persons from suffering through the inattention of the members of the court, occasioned by weariness and lassitude, courts-martial can sit only between the hours of eight in the morning, and four in the afternoon, except in the East Indies, where six in the morning is substituted for eight. This regulation, and indeed many others in these courts, might be adopted with advantage by other criminal courts, in which, on a press of business arising from a heavy calendar, and other causes, we often see convictions obtained with an indecent haste, which would not be endured in a military court.

No sentence of a court-martial is complete until it is approved of or confirmed by the sovereign, or some officer having an especial authority to do so. The Commander-in-Chief of the army abroad, and officers commanding on foreign stations, have this authority included in the warrant by which

they are empowered to convene courts-martial. But this power does not extend to cases where commissioned officers are sentenced to suffer death, or to be cashiered, or dismissed, except in India, where the power of the Governor General to approve and confirm is unrestricted. If there be a civil governor besides the general commanding, the former must also approve of the sentence, if it award death, but not otherwise. As to the sentences of inferior military courts, which have not the power to inflict capital punishment, they may be approved of (except in very rare instances) by the authority which convenes them. General officers commanding stations at home, and in the Channel islands, are not empowered to approve of the sentences of general courts-martial held within their commands, but must refer them, through the Judge Advocate General, for the approbation of the King. As a general rule, the person empowered to approve, can mitigate, commute, or remit altogether the sentences of courts-martial. Thus a sentence of six months' imprisonment may be mitigated to three, or corporeal punishment be commuted (with the consent of the delinquent) for imprisonment. But it is in the province of the King only (except perhaps the Governor General in India) to commute capital punishment for transportation, or to remit sentences whereby pay and pension have become forfeited for desertion. If the person to approve is satisfied with the proceedings and decision of the court, he writes, below the President's signature, the words "approved and confirmed," to which he subscribes his name. There is, however, a difference between the approval and confirmation. Thus, if the commanding officer or person to approve think the sentence too lenient, he may confirm though not approve of the sentence, thinking it better the delinquent should be visited with some, though in his opinion insufficient, punishment, than escape altogether. In this case he writes, before his signature, the words "confirmed but not approved." The withholding his approval makes no difference in the infliction of the sentence, and is merely done to justify himself with the higher powers; and testify his sense of the inadequacy of the punishment.

But if the person who should approve conceives that the court has gone beyond the exercise of its legal powers, or

that its proceedings are marked by any irregularity, especially regarding the admission of evidence, or that through the extreme leniency or severity of the sentence, the interests of the service are likely to be compromised, it is competent to him to order the court to revise its proceedings and re-consider its judgment. This was done, as we have seen, in the case of Lieutenant Dawson. If the court, on a careful revision of its proceedings, sees fit to alter its finding or sentence, such alteration is legal, and the sentence, as amended, is good. But on this revision, no new witness can be admitted, nor any fresh evidence from those already examined be received. The act must in fact be a simple revision. Every thing relating to the revision, including the order for that purpose, must be entered on the proceedings; no erasure is permitted, and any alteration must be made by addition. If the court, on solemn re-consideration, sees no sufficient reason for altering its opinion, the sentence must stand, and no further revision is lawful. It very seldom occurs that a revision leads to any alteration; the courts are generally very justly jealous of their dignity, and the surest way for a commander to incur odium with the army, would be the attempt to interfere, without very strong grounds, in their decisions. If after revision, the sovereign is still dissatisfied with the sentence of the court, on the score of leniency, he can still deprive the accused, if an officer, of his commission, by the exercise of his prerogative of dismissing any officer from his service at pleasure. But this power, as we before observed, is very objectionable. Considering that most officers purchase their commissions, it is quite enough that the crown should have the power of dismissing them without trial, but to put it in force against men, who have been declared innocent, after solemn trial by a court which never allows a mere quibble or informality to protect the guilty, is not only offensively arbitrary, but an absolute mockery of justice.

Notwithstanding the clause in the Mutiny Act, which requires that, "no sentence of a court-martial shall be liable to be revised more than once," it is still competent to any party, conceiving himself aggrieved by such sentence, to bring it, even after such revision, under the review of the superior courts of judicature. In fact the members of these courts are

often placed in very perplexing difficulties, for though the higher authorities, and even the sovereign himself, may have approved of their proceedings and sentence, they may still be sued in the civil courts for any illegality in form, or usurpation of authority, which they may have committed. It concerns them therefore that they, or at least the person officiating as the judge advocate, should be well acquainted, not only with the forms and jurisdiction of their own court, but with the rights and privileges as well as the practice of the common law. Actions against members of courts-martial for refusing to receive evidence, or deciding on improper evidence, have sometimes been brought, and heavy damages have been given. An officer of marines, who had been sentenced by a court-martial to a long imprisonment, on the written depositions of persons who might have been produced, obtained a verdict in the Common Pleas, 1000*l.* damages, against all the members of the court, notwithstanding that the sentence had been previously remitted by the king. But though the sentences of courts-martial are liable to be reviewed by the superior courts for any of the causes for which a new trial would be granted in a civil case, yet it appears there is but one ground on which a prohibition lies from the civil courts, to prevent the execution of the sentence of a court-martial, viz., excess of jurisdiction, as if a court-martial have tried a person not subject to military law. This was settled in the case of Serjeant Grant (before alluded to), who was tried in 1793 by a general court-martial, for enlisting two men into the service of the East India Company, knowing them to be soldiers in the Guards, and sentenced to receive one thousand lashes. A motion was made in the Common Pleas for a prohibition to prevent the execution of the sentence, on the ground that he was not regularly enlisted as a soldier, and therefore not liable to the military law. The motion failed, because it was proved that Grant was in receipt of pay as a serjeant of the 74th regiment, which fixed him with the character of a soldier, from which he could never be released, in the words of Lord Loughborough, "but by a regular military discharge." It was however laid down by his lordship, that such excess of jurisdiction was the legal foundation, and the only one, for a prohibition. "Beyond this

it does not appear to me that any other ground can be stated, upon which the courts of Westminster can interfere in the proceedings of other courts, where the matter is clearly within their jurisdiction; that they have decided wrong, may be a ground of appeal, it may be a ground of review, but not a ground of prohibition." It has been contended that the sentences of courts-martial are liable to be reversed by either house of parliament, but this is manifestly erroneous. The House of Commons, not possessing judicial functions, never could exercise such a power, howmuchsoever the proceedings of the military courts may be discussed and censured there. But the power of the House of Lords to review and reverse their sentences, in common with those of all other courts, is unquestionable, though it does not appear to have been ever exercised.

By the 75th section of the Mutiny Act it is provided, that actions brought against persons for any thing done in pursuance of the act, must be brought within six months, and that the defendant may plead the general issue, and give all special matters in evidence; and if the defendant obtain a verdict, or the plaintiff become nonsuit, the court shall allow treble costs to the former. By the same section, persons seeking redress against the members of a court-martial, are confined to the courts of record at Westminster and Dublin, and the court of session in Scotland. General officers and others commanding on foreign stations, may be sued for any oppression committed by them, in the Court of King's Bench, under the stat. 48 Geo. III. c. 85, and the matter or act may be laid to have been done in Westminster.

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## ART. II.—THE AMERICAN PENITENTIARIES.

*Report of William Crawford Esq. on the Penitentiaries of the United States, addressed to his Majesty's Principal Secretary of State for the Home Department. Ordered by the House of Commons to be printed, 11 August, 1834.*

IN our tenth volume (art. vi.) we gave our readers an account of the penitentiary system of the United States, on the authority of the able work of MM. de Beaumont and de Tocqueville, of which an English translation by Dr. Lieber, accompanied with some additional matter, has since been published in America. Since the appearance of that work, the English government, desirous to obtain additional information on the question of prison discipline, (to which the recent discussions on the punishment of transportation have given a new interest), have sent a commissioner to North America, for the purpose of "inspecting the several Penitentiaries of the United States, with a view to ascertain the practicability and expediency of applying the respective systems on which they are governed, or any parts thereof, to the prisons of this country." Mr. Crawford, the gentleman charged with this mission, appears by his previous knowledge of the subject-matter of his inquiry, and his powers of accurate observation and sound judgment, to have been peculiarly well fitted for the task, and the result of his investigations is contained in the copious and detailed report now before us. We propose, in presenting to our readers the principal heads of this report, to give only a succinct statement of those points which have already been satisfactorily explained by MM. de Beaumont and de Tocqueville, and we shall dwell more at length on those matters in which Mr. Crawford has either added to their account, or in which he has formed a different view of the question.

Mr. Crawford begins his report with an interesting sketch of the state of the criminal law in the different States of the Union.

"The common law of England is still in force in the United States, except where altered by statute. In Rhode Island the charter of Charles II. still supplies the place of the constitutions adopted in most of the other states. Dis-

puted points of law are explained and decided by constant reference to the authority of English text books and the reports of decisions in the English courts. The rules of evidence and the definition of most of the principal crimes are generally similar to those received in the parent country. A distinction in cases of murder, by recognizing different degrees of that crime, prevails in several states. The Pennsylvanian law of 1794, after reciting that the several offences which are included under the general denomination of murder, differ so greatly from each other in their atrocity that it is unjust to involve them in the same punishment, enacts, 'that all murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree.' And this is the usual distinction, although slightly varied in different states; but every state which recognizes degrees seems to require, in order to constitute murder of the first degree, either the most deliberate malice, or that it should take place in the commission of a felony, or more frequently one of the principal felonies mentioned in the Pennsylvanian law. The recognition of different degrees of the same crime is in some states extended to several offences, especially where the criminal law has been most systematically arranged, as in New York; but it is somewhat remarkable that in this state there are no degrees of murder. The same effect however results from the different degrees of manslaughter, some of the highest of which comprehend cases which would by the law of England amount to murder. *The advantages of such an arrangement, independently of superior system and method, consist in pointing out to the public mind how the same act becomes more dangerous to society, and therefore more criminal, according to attendant circumstances; and also in many cases, in securing the infliction of a greater penalty for an aggravated offence.* To take for example the crime of arson in New York: To set fire to an empty house by day, is the *fourth or lowest degree* of arson, and the penalty is imprisonment from two to seven years.

If the same should be done by night, it becomes arson of *the third degree*, and seven years is the shortest term for which the prisoner can be sentenced, and this may be extended to ten years. If the house be not empty, the crime, although committed by day, would be arson of *the second degree*, and punished with imprisonment for not less than ten years; and if the offence were committed by night, it would amount to the *highest degree* of arson, the penalty for which is death. In a similar way the law generally regards the crimes of burglary and robbery as aggravated by the offender being armed or by the use of violence. In the case of manslaughter, even where degrees are not generally observed, a distinction is frequently taken in favour of involuntary manslaughter, committed in doing some unlawful act which would not render the offender guilty of murder. *The effect of this discrimination is to leave less to the discretion of the court or jury (as the case may be according to the law of the state) than must necessarily be done where the same nominal offence comprises every degree of guilt, and so to give less occasion to the greater criminal to calculate upon a lenient punishment."*

In these changes of the criminal law, which the Americans of the United States derived from us, there is much which we could imitate with great advantage. One of the greatest defects of our present criminal system is the extreme vagueness in the description of the offences, and the consequent uncertainty in the allotment of punishment. Where the discretion is so large, the same judge may at different times mete out different lots of punishment for offences of the same criminality, while the views of different judges may be naturally expected to be still more discordant. The attention paid to character, to the entreaties of prosecutors, or the representations of magistrates, and other influential persons, have likewise a mischievous effect in serving to render uncertain and fluctuating that lot of punishment which ought to be inflicted with almost mechanical regularity.

The criminal law in the United States is administered by justices of the peace, circuit judges, and the superior courts. The justices of the peace have nearly the same functions, with respect to the preliminary parts of criminal procedure, as in this country: their mode of appointment varies; in some



states they are elected by the governors, in others by the legislature, in others by the people : the recent alterations in the mode of appointment have uniformly been in favour of the more popular form of election.

“ There is generally in each county, as in Scotland, a public officer, who in ordinary cases prefers indictments and conducts the trial throughout. This, although it will not by any means secure a prosecution wherever it may be required, must certainly render the administration of criminal justice more certain, by diminishing the number of offences which may be committed with impunity from the unwillingness of parties to prosecute. If indeed on the commission of an offence the sufferer determine from the first to abstain from proceeding, no prosecution will in the majority of cases be instituted ; but, if either irritated by his loss, or impelled by a sense of public duty, he take any step in the affair, the interests of justice cannot easily be defeated by his subsequent conduct. The matter being then in the hands of the public prosecutor, the injured party is merely a witness, and if his testimony be material it is secured ; but he is at the same time relieved from all care and consideration as to the manner of conducting the prosecution, the expense attendant upon it, and the means and probability of being reimbursed. The *province of the jury* is in some states of much the same extent as in England, except that they appear less controlled by the judge, even in matters of law ; whilst in other states, besides dividing absolutely on the guilt or innocence of the accused, they determine his punishment, if guilty, fixing the amount of the fine, the duration of the imprisonment, and even the number of lashes to be inflicted. How completely uniformity of punishment, one of the most powerful means of rendering it effective, is thus lost sight of, it is needless to observe. Experience shows how difficult it is to preserve an uniform course of punishment, wherever the legislature has afforded any latitude for discretion, although this discretion be exercised by men of similar education, habits, studies, and employments. But where none of these points of similarity exist in the various tribunals, any approach to uniformity of punishment must be impracticable.”

Generally, throughout the Union, the punishments are fixed

at a less severe rate than according to the letter of the English law, and in general the criminal administration is less severe than the practice of the English law. The number of capital offences however varies considerably in the different states. In New York arson of the first degree, murder and treason, are alone punished with death: in Pennsylvania murder is alone capital, and according to the law of that state, all executions are to take place, not in public, but within the walls of the gaol, in the presence of certain official persons. In most of the states rape, as well as murder, is capital; and in several the punishment of death is extended to arson, burglary with arms, and robbery with violence. The punishment for forgery is imprisonment (sometimes with a fine), varying in the different states from three to twenty years.

“The most striking character, however, respecting the laws of the United States, especially to those familiar only with the circumstances and situation of criminals in Great Britain, is the desire shown for making reparation, not only to the state, by payment of a fine, but also to the party injured in cases affecting his property. In some states, in New York and Tennessee for instance, the party injured may have execution against the convict for the amount of his loss, when capable of being estimated by damages, which is done by the jury who try the offender. In others, as Virginia and Missouri, restoration of the property stolen, or its value, forms part of the sentence. This practice obtains very generally in the case of stealing slaves or horses; and in those instances, where restitution is not made, the sum to be paid is usually double or treble the value of the slave or horse. In Rhode Island, in the case of larceny, the owner is to receive full value as well as his property. In Connecticut, part of the punishment for forgery committed on a private person, is a fine of double the amount of the damage sustained, to be paid to the injured party. The convict is generally made liable to the state for the costs of his own prosecution; but his property, if more than sufficient for this purpose, is not forfeited; indeed the law, in some instances, specially provides for the administration of the estates of convicts during their imprisonment. That the fullest reparation should be made by the offender to the injured party is in the highest degree desirable, if it can be

effected without on the one hand excluding a material, or on the other admitting an interested witness. But the principal object of such punishments, viz. the increased certainty of their infliction in consequence of the additional inducement to prosecute, would not be much promoted in a community where the pecuniary circumstances of the criminals must, in the great majority of cases, render this part of the law little else than nominal."

If the object is to increase the certainty of prosecutions, this object is best promoted by taking them out of the hands of the injured party, and by appointing a public officer to conduct them. If, however, the object is to indemnify the injured party for the loss which he has sustained from the criminal act, there can be no reason why the Court should not assess the damage, and award the payment from the property of the prisoner, if he has any. But in most cases, the persons who appear at a criminal bar either are entirely destitute, or have no property which a court of law can reach; and the only means of affording compensation to the injured party would be for the state to reimburse him to the amount of his loss, or (what would nearly come to the same) that this sum should be paid from the proceeds of the convict's labour. It seems at first sight equitable, that the state should make good to a person all losses occasioned by its own failure to protect his property; but we are convinced that such a regulation would lead to most mischievous consequences. The state would, in fact, become surety for all losses occasioned by robbery; and thus would weaken the motive for watchfulness and care on the part of the owner, which is a far more effectual preservation of property than the protection of the state: in the same way that a public provision in case of indigence weakens the motive for frugality and providence.

"But whatever (continues Mr. Crawford) may be the character of the criminal codes, or the discipline of the prisons, there exists a power which is constantly at work to impair the efficiency of the law and undermine the best effects of punishment. The evil to which I advert is the frequent exercise of the privilege of pardon; a power only to be used for the purpose of preventing the law from being carried into effect, contrary to its true spirit, but never to restrain or counteract

its obvious operations. Circumstances may arise calculated to excite considerable doubt of the guilt of a party, if not to disprove it altogether. An offence may occur, the punishment of which, according to the letter of the law, would be wholly repugnant to its spirit, arising either from oversight in the legislature, or the peculiar circumstances of the case. In such instances the power of pardoning is required for the protection of innocence, either absolute or comparative; but in all others, the remission of punishment by pardon cannot fail to act as a direct incentive to crime. Whenever an offender hears of a pardon being granted for any delinquency which bears but a distant resemblance to his own, although in fifty other such cases the full punishment may be carried into effect, he immediately regards the circumstance not merely as another added to the many chances of escape on which he has relied, but as that resource which, on the failure of all others, will extricate him from his difficulties. He sees no reason why he should be less fortunate than his associate. It is true that the same principle of calculation ought to be applied to each of the fifty cases in which the punishment is carried into effect; but that this is not the manner in which criminals are prone to reckon is obvious from the history of mankind. All men estimate too highly the chances in their favour, and this propensity is greatly increased by a life of hazard and danger. That offences may be committed with impunity is with the criminal a favourite theory, and he eagerly seizes and applies to himself every instance that can tend to support it. *But if one pardon in fifty operates thus injuriously, what must inevitably be the effect when the proportion amounts to one in four? This has been the average rate of pardons in the state of New York during the last ten years.* The present rate, however, though quite sufficient to be highly prejudicial, falls far short of the above proportion. A sense of the evils attending the system is now gaining ground; but the obstacles to its abolition are very great. In each state the power of pardon is vested in the governor. Although he may be induced by a sense of duty to resist feelings of private compassion, the importunities of the convict's friends, or the influence of immediate connexions, yet where vast numbers of his constituency, to whom alone he is

responsible, from whom he holds his authority, and to whom he looks for its renewal, concur in supporting any of those specious claims to leniency which few cases fail altogether to possess; when petitions are presented numerously signed, and apparently in the cause of mercy, a governor will rarely be found of sufficient firmness to resist the importunity. Should the first application fail, the convict's friends have only to renew their endeavours; perseverance will obtain an increased number of petitioners. The expiration of a part of the term of imprisonment renders the object more easily attainable; while a good account of the prisoner's conduct during confinement, which, with such expectations, he will take care to procure, will be used to prove him the more deserving. Thus each repetition of efforts in favour of pardon is made with additional advantage, and the only limit to these applications is the duration of the imprisonment. *The longer therefore the term for which the convict is sentenced, and consequently the more aggravated his crime, the greater are the probabilities of his obtaining a pardon.*<sup>1</sup> It is accordingly found, that of twenty-seven prisoners pardoned at Auburn in one year (1831), eight had been sentenced for life, two for ten years and upwards, four for seven, six for five, three for four, and one for two years; so that of the twenty-seven pardoned, seventeen, or nearly two-thirds, had been sentenced to seven years or upwards; while those sentenced to less than five years amounted to but little more than one-seventh."

Our readers will find in our article on the work of MM. de Beaumont and de Tocqueville, an account of the two rival penitentiary systems, viz. those pursued in the Auburn prison, belonging to the state of New York, and in the Eastern Penitentiary belonging to the state of Philadelphia: the former of which depends on solitude by night, and labour in company, but in silence, by day; while the latter enforces perpetual solitude, combined with labour. Of the first of these principles Mr. Crawford says, "Those who are acquainted with the history and present state of prison discipline in Europe, will at once perceive that the plan adopted for the government of the Auburn Penitentiary, is that which has been, with a few periods of intermission, for many years pursued at the Maison

<sup>1</sup> See some remarks on this head to the same effect in *Law Mag.* vol. xi. p. 299.

de Forcé at Ghent. The descriptions given of that celebrated establishment in the works of Mr. Howard and Mr. Buxton strictly apply to the Auburn Penitentiary."—p. 18. Of the Eastern Penitentiary he remarks, "To the merits of this penitentiary, I have much pleasure in bearing favourable testimony. In doing so, however, it is but right to observe, that there is no peculiar novelty in the general features of the plan, nor any just ground for that claim to originality, which some of its advocates have been induced to urge. The main principles of the system were in force in England, at the Gloucester penitentiary, forty years ago; and whatever improvements may have been effected in Philadelphia on the plan then pursued, have already been known and practised in this kingdom. The Eastern Penitentiary is in fact, with some trifling difference in its arrangements, but a counterpart of the bridewell at Glasgow, a prison which was in operation five years before the erection of the prison at Philadelphia."—p. 14. Although the Americans of the United States may not have been the first to *discover* the principles of prison discipline here alluded to, yet they were the first to carry them consistently into practice, and to employ them on a large scale; so that in fact they have afforded a practical solution of the difficult problem of establishing a good secondary punishment. The combination of labour and solitude has, it is true, existed for many years in Glasgow bridewell; but its example was so completely lost on this country, that (although ourselves aware of the excellence of its management) we do not remember ever to have seen any mention of it before this notice in Mr. Crawford's report; and we suspect that there are many more people in England who have become conscious of the merits of this penitentiary system, by the accounts of the American penitentiaries, than by any knowledge of the Glasgow bridewell. Whenever any important improvement is for the first time established in practice, and its merits are generally made known to the world, it is always found that mankind had in fact long ago been in possession of the secret, or that the supposed discoverer deserves no credit for his discovery. When John Hunter introduced the operation for aneurism, there were persons who affirmed that it had been described in surgical treatises written some centuries before his time; the

steam-engine, and its application to navigation, were likewise found in old books; and the practice of laying on roads only stones of a small size, which has made so great a change in the quickness and comfort of travelling, is stated (and doubtless with truth) to have been recommended before Mr. M'Adam. The fact is, that a barren unobserved principle, thrown out perhaps as a casual suggestion, and not adequately appreciated even by the discoverer, is of little use to mankind; the true discoverer is he who not only discovers the principle, but is conscious of its utility, and impresses it upon the attention of mankind. If we allowed the title of discoverer to every person who throws out a random hint, of the value of which he is not aware, we must deprive Columbus of the credit of having discovered America, in favour of Seneca the poet, who predicted that the time would once come when the ocean would unloose its bonds, and Thule would not be the most distant of lands.

The question, however, which more immediately concerns us is, not who have the best right to be considered the inventors of these two systems of prison-discipline, but, supposing them to be admitted to be superior to all other modes of penitentiary punishment, which of the two is preferable? In our former article, after examining the evidence furnished by the French commissioners, we stated that "our opinion inclined to a preference of the Auburn system, even if the expenses were equal; but as both agree in admitting the same fundamental principle of perpetual silence, made endurable by means of labour and instruction, it did not appear to us that a government could err in adopting either method." (vol. 10, p. 134.) Mr. Crawford appears to have investigated more minutely the state of the penitentiaries conducted on the Auburn system, or at any rate to have furnished more detailed information respecting them than his predecessors; and from his account, of which we shall give copious extracts, it now seems to us that the preponderance of advantages lies on the side of the Philadelphia system.

Speaking of the Eastern Penitentiary, Mr. Crawford says:—"Having had the unrestrained privilege of visiting the cells at all times, I have had many opportunities of conversing in private with a considerable number of the prisoners. Aware

of the strong feeling which exists of the danger resulting from long periods of solitary confinement thus strictly enforced, my inquiries were carefully directed to the effects which it had produced upon the health, mind, and character of the convict. *I have uniformly found that the deterring influence is extremely great, and such as I believe belongs to no other system of gaol management*; for although in large bodies associated together, silence may, by strict discipline, be in a great measure maintained; prisoners thus debarred from speaking, have inevitably recourse to other modes of communication. I do not wish it to be inferred that moral corruption can result from intercourse so limited, yet when men are day after day thrown into the society of each other, the irksomeness of imprisonment becomes impaired, and its terrors materially diminished. The Eastern Penitentiary imparts no such relief. Of the convicts with whom I conversed, many had been previously confined in the New York and other prisons, where corporal punishments were frequent, but these persons have declared that that discipline was less corrective than the restraints of continued solitude. When prisoners are associated, it is extremely difficult to cut off all intercourse from without. The arrival of new and the discharge of other convicts, form constant channels of communication. In the Eastern Penitentiary, the separation from the world is certain and complete. So strict is this seclusion, that I found, on conversing with the prisoners, that they were not aware of the existence of the cholera, which had but a few months before prevailed in Philadelphia. The exclusion of all knowledge of their friends is severely felt. *But although every allusion to their situation was accompanied by a strong sense of the punishment to which they were subjected, I could perceive no angry or vindictive feelings.* I was indeed particularly struck with the mild and subdued spirit which seemed to pervade the temper of the convicts, and which is essentially promoted by reflection, solitude, and the absence of corporal punishment. The only offences in the Eastern Penitentiary, which the prisoner can commit, are idleness and wilful damage to the materials on which he is at work. On such occasions, he is punished with the loss of employment, the diminution of his food, or close confinement in a darkened cell. The necessity



for correction is extremely rare. There is not a whip, nor are there any fire-arms, within the walls of the prison."

"Solitary imprisonment (continues Mr. Crawford) is not only an exemplary punishment, but a powerful agent in the reformation of morals. It inevitably tends to arrest the progress of corruption. In the silence of the cell, contamination cannot be received or imparted. A sense of degradation cannot be excited by exposure, nor reformation checked by false shame. Day after day, with no companions but his thoughts, the convict is compelled to reflect and listen to the reproofs of conscience. He is led to dwell upon past errors, and to cherish whatever better feelings he may at any time have imbibed. These circumstances are in the highest degree calculated to ameliorate the affections and reclaim the heart. The mind becomes open to the best impressions, and prepared for the reception of those truths and consolations which Christianity can alone impart. Instances have occurred in which prisoners have expressed their gratitude for the moral benefit which they have thus derived."

Mr. Crawford then proceeds to explain that these advantages have not been as fully obtained in the Eastern Penitentiary as they might have been, from the want of a paid chaplain or religious instructor for the convicts. This omission seems to arise from too strict an adherence to the principle universally adopted in the United States, that all religious instruction is to be supplied on the voluntary principle, without any assistance on the part of the government.

"The regulation (he goes on to say) by which one prisoner is strictly prohibited from seeing another is peculiarly beneficial. It not only forms a material addition to the punishment, promotes security, and cuts off the possibility of all communication, but it extends great advantages to the individual on his discharge. The propensity of convicts on their liberation to revive acquaintances formed in prison is notorious. If any individual so situated be disposed to abandon his criminal habits, he is too often assailed by temptations from his late associates, and threatened by exposure. An instance of this kind was related to me of a convict who had manifested great contrition for his past life, and conducted himself

so well as to obtain his pardon from the Walnut Street prison.<sup>1</sup> Having been recommitted he was asked why he had returned: he replied, 'I intended to behave well, and I went for that purpose into the state of Ohio, where I hoped that my former character would be unknown and I might set out anew in life. I got employment and was doing well, when unfortunately I one day met a man who had been a convict here at the same time as myself. I passed him, feigning not to know him: he followed me and said, 'I know and will expose you, so you need not expect to shun me. It is folly to set out to be honest. Come with me and drink, and we will talk over old affairs.' I could not escape from him: my spirits sunk in despair and I went with him. The result you know.' The seclusion of the Eastern Penitentiary removes this formidable obstacle to reformation. The convict on leaving his cell re-enters the world unknown by any of the former inmates of the prison."

Since the opening of the Eastern Penitentiary there have been only four cases of lunacy and one of idiocy among the convicts. All these persons seem to have laboured under mental disorder before the period of their admission, and this tendency does not appear to have been increased by the discipline of the penitentiary. "The physician remarks, that the discipline has the effect of rendering the frame less robust, but at the same time prevents the occurrence of much disease, to which persons of the class who generally become the inmates of a prison are usually subjected, either from exposure to weather or indulgence of vicious habits."

After some remarks on the unsatisfactory nature of all inferences with respect to the efficacy of a prison, drawn from the supposed number of recommitments, in which we entirely agree, Mr. Crawford concludes by stating, that "upon a careful review of every part of the Eastern Penitentiary; after seeing the whole and examining a considerable number of the individuals confined in it, I have no hesitation in declaring my conviction that its discipline is a safe and efficacious mode of prison management; that it has no unfavourable effect upon the mind or health; and that with the addition of moral and religious instruction (in which this penitentiary is eminently

<sup>1</sup> On this prison, see *Law Mag.* vol. x. p. 115.

deficient), solitary imprisonment thus enforced may be rendered powerfully instrumental, not only in deterring but also in reclaiming the offender."

On the subject of solitary confinement generally Mr. Crawford makes the following remarks :—

" Solitary imprisonment has been objected to as unequal in its effects, operating with greater severity upon active than upon sluggish minds ; but inequality applies to every species of punishment, affecting men more or less according to the endless variety of character, disposition, and even of physical conformation. The experience of both England and America has, however, shown that the penalties of solitude are of a more just and general nature than is usually ascribed to them, and that they are peculiarly irksome not to the sensitive and cultivated mind so much as to the hardened and depraved. The terrors of solitude operate most powerfully on that class in the treatment of whom severity is most desirable. The warden of the Eastern Penitentiary has remarked, that in every instance in which a prisoner has been brought to see the errors of his past life, his cell has in a great measure appeared to lose its horrors. Many vague and confused notions are entertained on this subject. In America, the opponents of this system have produced very erroneous impressions, by the publication of certain experiments made a few years since of solitude without labour ; statements which have also been widely circulated in England, to the great prejudice of solitary imprisonment of every description. Having carefully inspected the prisons in question, I feel bound to state my conviction, that the fatal effects which have been described were not the result of solitude, but of the contracted dimensions and unhealthy condition of the cells in which the experiments were conducted."

We need not repeat Mr. Crawford's account of the Auburn Penitentiary, in which the principle of work during the day in company but in silence is established. According to the other system, the convict has not the power of committing any breach of discipline, and therefore no punishment for the infraction of the prison is required ; but in the Auburn Penitentiary it is otherwise.

" The discipline (says Mr. Crawford) by which the govern-

ment of this penitentiary is maintained may be very briefly described. The convict is prohibited from speaking to any fellow-prisoner. He is required to pursue his labour with down-cast eyes. If in any case he is detected in looking off his work, in gazing at or attempting to exchange communication with another prisoner, he is flogged by the overseer with a whip (a 'cat' or 'cowhide') in the presence of his associates. The correction is certain and immediate. The quantity of punishment is entirely dependent on the will of the overseer, against whose acts there is no appeal. The legislature formerly prohibited more than thirty-nine lashes from being inflicted at one time, unless in the presence of one of the inspectors; but the assistant keepers are now permitted to apply corporal punishment at their pleasure, without previous recourse either to an inspector or the superintendent. All that is required of them on such occasions is to report the name of the prisoner, the nature of the offence, and the number of the lashes which they have inflicted. There is no check upon the accuracy of these reports nor any protection afforded against the abuse of this authority." Mr. Crawford subjoins some facts which prove a serious abuse of this power of inflicting corporal punishment on the part of the assistant keepers. With regard to the general effects of this engine of prison discipline, Mr. Crawford remarks: "In the repeated conversations which I have held in private with convicts who have been thus governed by the terror of the whip, I have invariably found that this treatment produced strong feelings of degradation and revenge."

With regard to the enforcement of silence among convicts at work in company Mr. Crawford has the following important remarks, which differ from the conclusions arrived at by the French Commissioners. (See *Law Mag.* vol. x. pp. 121, 122.)

"Silence is unquestionably a moral agent of value in the government of prisons. It operates as a restraint, and is extremely favourable to habits of obedience, thoughtfulness and industry. Yet the effects of the Auburn Penitentiary, notwithstanding the order and regularity with which its discipline is enforced, have, I am persuaded, been greatly overrated. Its advocates maintain that the mental seclusion at Auburn is complete, and that the main objects of solitude are in fact

accomplished. But vigilant as are the precautions taken to prevent communication, the prisoners do hold intercourse by signs and whispers. For this there are at times opportunities, both in the workshops and when marching in close files. That such is the fact I have been assured by those who have been the inmates of this penitentiary. This intercourse, however slight and occasional, materially contributes to destroy that feeling of loneliness which is the greatest of all moral punishments, and which absolute and unremitted seclusion cannot fail to inspire. It is stated in an official report to the legislature, that 'even under the admirable discipline of Sing Sing, we (the commissioners) have seen, within a few weeks past, notes written on pieces of leather, tending to insurrection. So far as they can safely venture, they (the prisoners) will be found talking, laughing, singing, whistling, altercation and quarrelling with each other, and with the officers. They will idle away their time in gazing at spectators, and waste or destroy the stock they work upon.' 'If (add the commissioners) instead of being repressed by a blow, the usual irregularities of prisoners were to be reported for investigation, we are satisfied that endless litigations before the inspectors would ensue, requiring thereby their constant attention at the prison.'"

Mr. Crawford sums up his opinion on the comparative advantages of the Auburn and Philadelphia systems in the following terms :

"In judging of the comparative merits of the two systems, it will be seen that the discipline of Auburn is of a physical, that of Philadelphia of a moral character. The whip inflicts immediate pain, but solitude inspires permanent terror. The former degrades while it humiliates; the latter subdues, but it does not debase. At Auburn the convict is uniformly treated with harshness, at Philadelphia with civility; the one contributes to harden, the other to soften the affections. Auburn stimulates vindictive feelings; Philadelphia induces habitual submission. The Auburn prisoner, when liberated, conscious that he is known to past associates, and that the public eye has gazed upon him, sees an accuser in every man he meets. The Philadelphia convict quits his cell, secure from recognition and exempt from reproach."

Among the other penitentiaries, the only one which deserves particular attention is that of Wethersfield, in Connecticut, and we are the more called on to notice it, as its system is, we understand, likely to be recommended by the Lords' committee now sitting, for universal introduction into the gaols of this country.

"It is conducted (says Mr. Crawford) on the plan of association; the discipline adopted at Auburn being enforced as strictly as it can be, without the use of corporal punishment. The penalties for disobedience to the regulations are, as in England, solitude in a darkened cell, and a diminution of the allowance of food. This prison is extremely well managed, and affords the best example which I have seen of governing prisoners in large bodies without the use of the lash. Although the discipline may not inspire those feelings of terror which are in that case produced, it imposes very considerable restraint. That the warden should be able to dispense with the use of the whip arises not only from his own judicious management, but in some measure from the comparatively small number in his custody. A strong opinion prevails in the United States, that a discipline which strictly imposes silence, and prohibits a prisoner from looking off his work, cannot be enforced without corporal punishment. All doubt on this subject has, in my opinion, been removed by the government of the Wethersfield penitentiary."

Except in the state of New Jersey, the Auburn system has been generally followed in the recently constructed penitentiaries of the United States.<sup>1</sup> This preference has arisen, (according to Mr. Crawford,) first, from the Auburn being prior in point of time to the Philadelphia penitentiary; and secondly, from the greater cheapness of the building suited to it.

"To this obstacle must be added the opinion prevalent throughout the United States, (but which the able and experienced warden of the Philadelphia Penitentiary with great reason contests,) that solitary labour cannot be rendered so profitable as when the prisoners are associated. This object, which is regarded as one of primary importance, has effected

<sup>1</sup> See Law Mag. vol. x. p. 132.

a striking change of sentiment in respect to the duration of sentences. A few years since, the ordinary terms of imprisonment were thought inconveniently long, and hundreds were pardoned to make room for new commitments. In certain of the states, a sentence even of two years is considered as insufficient to render a prisoner's labour available, and hence it is not improbable that the present periods will ere long be extended. *It is remarkable that this change of opinion has been produced without reference to the degree of punishment due to specific crimes, but with a view to pecuniary results. The profitable labour of the prisoners is in fact the popular feature in the management of the American penitentiaries,* and I am inclined to think that the great desire which exists to rid the community of the burden of supporting criminals, has occasioned, in most of the states, the establishment of penitentiaries, while, throughout the whole country, this feeling has evidently given a great impulse to the progress of prison discipline. There are unquestionably in every state, those whose interest in these institutions springs from far higher motives; but, with the exception of New England and Pennsylvania, I have generally found that the public approbation in reference to prisons has been measured, not by their permanent effects on the moral character of the liberated convict, but by the profits of the establishment. The productive employment of prisoners is certainly an object of considerable importance, and every exertion should be made for its accomplishment, consistently with the great moral purposes of a gaol. I am however of opinion, that to attain this result, too large a sacrifice is made in some of the penitentiaries of the United States. *Various trades are introduced, and beneficial arrangements neglected, solely with a view to profit. The objects of punishment have thus been lost sight of.* The gloom of the penitentiary has been dispelled, and the attention of the convict distracted, by the continued bustle and varied occupations of the manufactory. It is one thing to render a convict a skilful mechanic, and another to induce him to become an honest man; and the interests of society are injured instead of being benefited, when for the sake of profit the penalties of the law are weakened, and the moral effects of punishment suppressed."

It is curious to observe how the same motive of mistaken economy has led, in very different ways, to the abuse of punishment, both in the United States and in England. In the United States, the prisons have been converted into manufactories; and the punishment and reformation of the convicts have been neglected, in order that their labour might be rendered productive. In England, the plan of making the convicts labour together not having been followed, and the facilities, moreover, of finding profitable employment being less, it has been thought that expense would be saved by sending them to a colony, where there is a plentiful demand for labour. But as in the colony it is much more expensive for the government to keep the convicts in a state of punishment, than to assign them to settlers as servants, on condition that the latter should maintain them, this last course was adopted, by which means (until a late change of system) almost all semblance of punishment for transported convicts, who had not committed fresh crimes in the colony, was dispensed with, and transportation, in proportion as it became cheap, became in fact emigration under a different name.

Mr. Crawford remarks, that it is difficult to ascertain the number of crimes committed in any part of the United States, partly from a want of official accounts of the number of commitments, and secondly, from the general reason that the number of crimes which are made the subject of legal investigation cannot be taken as an index to the number of crimes committed.<sup>1</sup> "The discrepancies" (says Mr. Crawford) "between the number of commitments and the actual extent of crime in the more western as well as the southern states, merit particular attention. There exists in those parts of the country a great recklessness of human life. Personal insult is resented by the immediate gratification of revenge. A custom prevails of carrying pocket pistols, or of wearing a dirk in the bosom, while scarcely any of the labouring classes are without a large clasp-knife, which, opening with a spring, becomes a truly formidable weapon. Hence assaults of the most desperate character in the public streets frequently occur, and death to the parties often ensues. Prosecutions,

<sup>1</sup> See Law Mag. vol. x. p. 134.



however, arising out of these acts of violence are by no means common. These offences pass, in many instances, in a legal sense, entirely unnoticed. An appeal to a court of justice in such cases would not be sanctioned by public opinion; and even if the offender were brought before a jury they would enter into a consideration of the provocation given by the parties, and discountenance by their verdict the practice of rendering such acts amenable to the ordinary course of criminal justice."<sup>1</sup>

Before considering the applicability of the American prison discipline to Great Britain, Mr. Crawford gives a sketch of the history of the penitentiary system in this country; the words of the earliest act on the subject are remarkable, as defining with singular precision the true ends of penal imprisonment.

"More than half a century has elapsed since Mr. Howard suggested the expediency of subjecting criminals to a more severe discipline than that ordinarily enforced in houses of correction. In conformity with this idea, an act for the establishment of Penitentiary houses was passed in the year 1776, the provisions of which were framed by that eminent man, in conjunction with Sir William Blackstone and Mr. Eden. The spirit and objects of the act are expressed in the pream-

<sup>1</sup> Mr. Crawford mentions in a note the following fact, as having been related to him by a most respectable clergyman of the state in which the circumstance occurred. "A gentleman residing in Alabama received a slight personal affront, which having been privately offered, he was disposed to pass unnoticed. The affair, however, became known, and it was suggested to him that he must resent the insult or withdraw from society. On receiving this information he immediately repaired, with a brace of pistols, to a neighbouring town, the residence of his opponent, and shot him as he was walking in the public streets. This was, of course, a matter of notoriety, and yet no legal proceedings were adopted. The gentleman on his return home was then received into the circle of his acquaintance. They said, that the satisfaction which he had taken was, it was true, somewhat late, but that this circumstance would be overlooked in consideration of his having promptly acted on the suggestion which had been made to him. I should add, that the newspapers of the southern and western states make frequent mention of assaults of this murderous character" (these occurrences are usually termed "shooting a man down,") "confirmatory of the condition of society, which this anecdote implies. I have related it in different states, and repeatedly heard its main features corroborated by similar narratives. On referring, however, to the table of commitments in those parts of the country, it will appear that the number of prisoners convicted of crimes of this nature is remarkably small."

ble to the 19 Geo. III. c. 74, which declares that ‘if many offenders convicted of crimes for which transportation has been usually inflicted, were ordered to solitary imprisonment accompanied by well-regulated labour and a religious instruction, it might be the means under Providence, not only of deterring others from the commission of the like crimes, but also of reforming the individuals and enuring them to habits of industry.’ And Sir William Blackstone states the principal objects of the measure to be ‘by sobriety, cleanliness, and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work, and by due religious instruction, to preserve and amend the health of the unhappy offenders, to inure them to habits of industry, to guard them from pernicious company, to accustom them to serious reflection, and to teach them both the principles and practice of every Christian and moral duty.’ It is to be regretted that the commissioners nominated in this act could not agree upon a site for the erection of the proposed penitentiary. This difficulty, however, was removed on the appointment of others, and plans had actually been prepared, when the government determined on the expediency of transporting convicts to New South Wales in preference to the establishment of a national penitentiary. But although the idea was for a time suspended, the principle laid down in Mr. Howard’s act was carried into effect by the erection in 1785 of a penitentiary in Gloucester. This was the first trial of a prison conducted on the principle of solitary confinement, and the merit of its application belongs to Sir George Paul and the magistrates of that county. Three years after the completion of this prison the design of a national penitentiary became again the subject of consideration. An offer had been made by Mr. Jeremy Bentham to erect a prison and contract for the safe custody and maintenance of 1000 convicts; and an act authorizing the government to accede to his proposal was passed in the year 1794. Various difficulties however occurred to prevent the execution of this plan; nor was the consideration of it renewed until the year 1810, when, on the motion of Sir Samuel Romilly, a committee was appointed to inquire into the expediency of proceeding further with the measure.”

This committee reported unfavourably to Mr. Bentham’s

proposal, but recommended that a separate penitentiary for London and Middlesex should be erected, and that measures should be taken for carrying on the penitentiary system in other parts of the country. This latter recommendation was however never carried into effect, on account of the extension of the system of transportation; and the plan of the Millbank Penitentiary, which had been originally designed to contain 300 males and 300 females, for London and Middlesex alone, was enlarged so as to enable it to contain 600 males and 400 females, and it became the general penitentiary for England and Wales. "Separation, not solitude, (says Mr. Crawford,) seems to have been originally the object of the discipline enforced at this penitentiary. The prisoners were divided into two classes, and the period of their detention into two portions. The first period was passed in a class in which every individual had a distinct cell, where he or she worked and slept; but even in this class the prisoners congregated at intervals, during the time allotted for working at the mills or water machines, or while taking exercise in the airing yards, at which periods it was impossible entirely to prevent intercourse. After remaining in the first class from eighteen months to two years, the prisoners were removed to the second division, where they worked in companies. The intelligent and experienced governor and chaplain of this penitentiary, have uniformly borne testimony to the good produced by the discipline of the first class, but declared that on being removed to the second class, these beneficial results were speedily counteracted. This evil was so strongly represented to the late Committee on Secondary Punishments, that they recommended the abolition of the second class, which is now no longer in existence."

Mr. Crawford proceeds to describe the provisions of the Gaol Act, (4 Geo. IV. c. 64,) the result of the labours of a committee of the House of Commons, appointed in 1822; and he afterwards states some reasons, independent of defective prison discipline, why the good effects anticipated from this measure have not been realized; such as want of employment, the increased consumption of ardent spirits, the operation of the poor laws and want of education.

"It must at the same time be admitted, (he continues to

say,) that notwithstanding all that has been done for the improvement of the prisons in England, they yet continue to be in a very defective state. *The physical condition of the convict has been greatly ameliorated, but no adequate sense of dread has been imparted to imprisonment*, nor have effectual means been employed to promote the moral reformation of the criminal. Favourable exceptions undoubtedly exist. It would be as erroneous to infer, that because most of the county gaols and houses of correction require further amendment, there are no good prisons in the kingdom, as that the discipline of the American penitentiaries is generally of a superior character, because a few of these establishments are well governed. It is not however too much to say, that there prevails throughout the prisons in England, a lamentable want of system, vigour and uniformity. Where labour is imposed, its corrective influence is lost from the absence of constant inspection and the means of restraint. Silence, although nominally enjoyed, is not scrupulously maintained, and prisoners are not, as they ought invariably to be, prohibited from looking off their work, and gazing at various objects in the wards and yards. Even regulations good in themselves are often so injudiciously carried into effect, as to interfere with and sensibly weaken the effects of punishment. Friends are permitted to visit. Letters are allowed to be received and transmitted, and the penalties of the law are counteracted by lenient measures, well-intentioned, but in their effects highly injurious. In several instances in which the prison has been built for the separate confinement of the inmates at night, the increase of commitments has no longer allowed of this beneficial arrangement, and in many cases the most useful provisions of the law have been partially evaded, and in others altogether neglected. I make these statements respecting the general condition of the prisons in this country advisedly, and with the greater confidence, having visited the principal county gaols and houses of correction in England since my return from the United States."

In considering the best remedy for these defects, Mr. Crawford expresses a strong opinion in favour of solitary confinement with labour, for all classes of criminals, but states that the expense of this system is such as to throw great difficulties

in the way of its adoption. He therefore acquiesces in the system of silence and association pursued at Wethersfield, and at the Wakefield house of correction for the West Riding of Yorkshire, retaining, however, the punishment of entire solitude for certain classes of offenders. He warns however the friends of this system, not to be too sanguine as to its good effects, on the ground that complete seclusion is alone sufficient to prevent communication among criminals.

Mr. Crawford next gives a sketch of the present state of the prisons of England, and subjoins to it the following recommendations, the result (he states) of numerous observations, and on which he has found a striking concurrence of opinion in the minds of many persons officially conversant with the administration of prisons.

“ 1st. That it is expedient to diminish, as much as possible, the number of persons committed for safe custody only, and with this view to extend the practice of taking bail as widely as is consistent with the public interests.

“ 2dly. That there should be a more frequent delivery of county gaols than twice in the year. . . . In the case of parties who are eventually acquitted, the cruelty of the existing system is sufficiently apparent; but with regard to those sentenced to short terms of imprisonment, it is scarcely less unjust. A large proportion of prisoners are in confinement before trial for a longer period than that to which, if guilty, they are ultimately sentenced. The total number of persons committed for trial at the assizes and quarter sessions in England and Wales, during the last seven years, amounted to 131,818. Of this number, 49,845, or upwards of one-third, were sentenced to periods not exceeding six months. Many of these persons therefore suffered, before conviction, a longer imprisonment than that to which they were subsequently adjudged.

“ 3dly. That provision should be made in every gaol and house of correction for the solitary confinement of certain classes. The nature of this description of prison discipline admits of three degrees. The first of these is solitude for short periods, with employment, combined with arrangements tending materially to diminish the wearisomeness of confinement. This mitigated seclusion is well adapted to the situa-

tion of the untried. The next modification of solitary confinement is its infliction for short periods, unaccompanied by employment. The enforcement of solitude and silence changes altogether the character of prison labour, which is no longer regarded as a penalty but as an alleviation of the greater punishment. Employment of some kind is indispensable to the maintenance of silence, but the case is different in respect to solitude. The last degree of severity consists in solitary confinement for a long term, and for which labour is absolutely indispensable.

“4thly. That every prisoner should have a separate sleeping cell.

“5thly. Where the preferable system of solitary confinement is not adopted, silence should be rigidly maintained by day as well as by night. Silence is the nearest approximation to solitude, and is indispensable to the good government of a prison.

“6thly. That in the confinement of prisoners in association, the convict, when employed, should be required to pursue his work with downcast eyes, take his meals alone, be kept apart when not actually engaged at labour, and at all times prohibited from holding any intercourse with another prisoner.

“7thly. That for the maintenance of solitary confinement for lengthened periods, as well as of silence, it is necessary that prisoners subjected to either plan of prison discipline should be habitually employed. Objections have, I know, been urged against the employment of criminals at any trade, on the ground that the practice tends to diminish the demand for the labour of the honest and industrious : but the same may be said of the introduction of labour into a parish workhouse. *Every man, whether convict or pauper, is entitled to his fair share in the productive employment which the country affords ; nor does he forfeit the right of earning his subsistence by becoming either the tenant of a poorhouse or a gaol.* The law does not doom the criminal to idleness as well as to imprisonment. If the individual were previously engaged in habits of industry, his employment during confinement cannot diminish the demand for the labour of others. Should this not have been the case it becomes the duty of society, by the application of such

means as may be essential for the purpose, to render the idle industrious, in order to convert him into a honest man.

" 8thly. That provision be made for establishing a more efficient system than at present prevails of communicating religious instruction. The vice and depravity to be found in every gaol has led to an impression, by far too general, that most criminals are beyond the reach of reformation. Whatever may be the fact, I feel assured that the trial in few prisons has been fairly made.

" 9thly. That the mere classification of prisoners fails to prevent corrupt intercourse.

" 10thly. That the rigour of imprisonment should be equal, certain, and unremitted. The best system of gaol management will be ineffectual if its salutary terrors are to be impaired by indulgences of any description. It is not less unjustifiable to mitigate than to aggravate the penalties of justice.

" 11thly. That there should be an uniformity in the discipline of prisons throughout the kingdom. Nothing can be more vague than a sentence of imprisonment and hard labour. A convict is adjudged to both ; but neither the discipline of the prison, nor the nature of the employment, on which the severity of the sentence principally depends, is in any manner defined ; nor is the court, in many cases, aware of the actual punishment which it awards.

" 12thly. That the sentence of the law should not be abridged by recommendations for pardon, in consequence of good conduct during imprisonment.

" 13thly. That the gaols under corporate jurisdiction be abolished, (with the exception of those employed for temporal purposes only), the magistrates of which have not complied with the provisions required by the 5 Geo. IV., c. 85, and who refuse to avail themselves of the power which the law has given to them of making arrangements for the committal of their prisoners to the county gaols.

" 14thly. That increased attention be paid to the character and ability of the subordinate officers of prisons.

" 15thly. The last suggestion which I take the liberty to offer, is that arrangements should be made for enabling the convict on his discharge to earn an honest subsistence. The

best system of prison discipline must necessarily be ineffectual if the offender on his liberation be unable to procure employment by which to earn a creditable livelihood."

Mr. Crawford proceeds to make some other remarks on this interesting but difficult question, which we propose to consider at a future period, in a separate article on the treatment of discharged convicts. We shall postpone to the same occasion the account of the American Houses of Refuge for young offenders, which forms the remaining part of Mr. Crawford's valuable report. It appears to us that the method of solitary confinement, with labour, has completely solved the problem of a good secondary punishment; that is, a punishment, short of death, which shall be an object of terror to the community at large, which shall prevent the possibility of additional corruption for the convict, and shall offer a fair chance of his moral reformation. In the difficult questions of police and judicial procedure before the punishment, and of the means of disposing of the convict after his discharge, there is a wide field still open for inquiry. The latter of these questions offers less difficulties in the United States, where labour is plentiful and where there are large tracts of unappropriated and uncultivated land: in England, however, an old settled country, where every branch of industry is overloaded with competitors for employment, it is far less easy to find the means of affording to discharged convicts the option (which now is frequently not offered to them) of leading an honest life, without at the same time offering a premium to idleness. The advocates of transportation probably have had an indistinct vision of its advantage in this respect, though they have insisted chiefly on its influence in *getting rid* of criminals; but while we admit that transportation can be defended on this ground with some show of reason, we think it a wholly inadequate one: and at any rate transportation ought to be considered not as a punishment, but as a means of providing for convicts whose punishment has expired.

L.



## ART. III.—LIFE OF SIR VICARY GIBBS.

DEVONSHIRE has been from early times distinguished as the nursing mother of eminent lawyers. It was long since remarked by Fuller, that this county seems innated with a genius to study law, none in England (Norfolk alone excepted) affording so many legal men. "Cornwall, indeed," he says, "hath a famine, but Devonshire makes a feast of such, who by the practice thereof have raised great estates." These occur among other great names:—the two Fortescues, Aland, an able judge, Sir W. de Bathe, Sir Thomas Littleton, Sir John Dodderidge, Sir John Maynard, and Peere Williams. Another century has added to this proud array the still more noble names of Camden, Dunning, Buller, Lord Chancellor King, Gifford, Heath, and Gibbs, the four last of whom are natives of Exeter. Nor is the race of legal worthies likely soon to degenerate or become extinct, since the Coleridges and Folletts are even now claiming fresh forensic honours for this highly favoured county.

Sir Vicary Gibbs was born at Exeter in 1751, in the Cathedral close, within a few doors from the birth-place of John Heath, his future colleague on the bench. He was the son of a surgeon and apothecary, who had practised in that city for many years, and laboured hard—such is the common lot of his profession—for a small competence. The acuteness of young Gibbs, which early developed itself, tempted his father to incur the expense of sending him to Eton, then under the able care of Dr. Barnard, the reputation of whose talents had already raised the number of scholars from 300 to 500. The great public schools have been always especial favourites with ambitious parents, from the facilities which they afford to the establishment of eligible friendships. But the character of the young Etonian was ill adapted to further any such scheme of promotion. "The boy's the father of the man," and he proved himself both too independent and too testy to become a tuft-hunter. He formed intimacies, indeed, with many who like himself pushed their way in after-life into high stations, amongst whom may be mentioned Dr. Rennell; Plomer, the Vice Chancellor; Cornwall, Speaker of the House of Commons; Dr. Goodall, and Mr. Justice Dam-

pier: but he sought no patrons, and found none. The apothecary's son had neither sprightliness nor humour to atone for deficiencies of birth, and that aristocratic little community made no allowance for the waywardness of a plebeian fag. He soon gained distinction, however, by that test of elegant scholarship, the composition of Latin verse. A pretty classical collection, the *Musæ Etonenses*, contains some pleasing specimens of his proficiency, but shows at the same time the mechanical skill without the mind of a poet, and proves to demonstration that there was no "sweet Ovid lost" in Gibbs. At sixteen he was elected scholar of King's College, Cambridge, on Lord Craven's foundation—a scholarship "passing rich" with 25*l.* a year. The value is inconsiderable, but the repute which these scholarships hold in the University may be collected from the fact that the scholar who preceded young Gibbs was Seale, and his successor Richard Porson. King's College in his time enjoyed the privilege, if it may be termed a privilege—of its fellows taking their degrees without a public examination; a boon to the slothful, a privation to the emulous. A syndicate has lately abolished this injudicious exemption, and permits the ambitious scholar to win that distinction in the Senate House, of which our young student justly thought himself defrauded. He took his bachelor's degree in 1772, and was elected a fellow of his college, but did not reside long, being eager to enter himself at Lincoln's Inn and study for the bar. The tradition of his excellence as a Greek scholar still lingers in the University.

To a student just graduated at Cambridge, who has rejoiced in classical themes and classical associations, the first study of the law is scarcely less repulsive than the atmosphere of the dissecting-room to a novice in medicine fresh from the purity of country air. The art and mystery of special pleading, however logical and inviting scrutiny in its present amended form, appears at first to substitute an uncouth jargon for the ancient models of thought and style—to have no sympathy with the feelings or fancy, and to dispense with all literary acquirements. The system was darkened with vain and unprofitable subtleties, with unmeaning fictions, infinite minuteness and wearisome prolixity. The technical terms colour, continuance, negative pregnant, certainty to a common intent, duplicity, common bar, and a thousand others.

tend at first to vex the ear and dispirit the learner.”<sup>1</sup> In the study of the law,” writes Mr. Gray to his friend West, “the labour is long and the elements dry and uninteresting; nor was ever anybody, (especially those that afterwards made a figure) amused, or even not disgusted, at the beginning.” It was natural that Mr. Gibbs should feel this disgust—he had the merit of having felt and mastered it. To discipline his mind to perfect legal habitudes of thought, to acquire a thorough knowledge of that exact science, in the development of whose principles the most subtle intellects have been exercised, was the employment of his morning and midnight hours, a diligence the more exemplary from its contrast with the previous license of King’s, which had no senate-house to prepare for, no January matins to dread. We have seldom read of a student who devoted his whole heart and mind with more perfect singleness of purpose to the study of his profession. The “*res angusta domi*,” straitened means, came in aid of his ambition. He had no connection to force business, nor wealth to supply its absence, and knew that he must depend entirely on his own personal competency for success. During the three years of his pupilage he carefully abstained from all clubs, either of a literary or social character, was a stranger to the West-end and the parks, and in general emerged from his chambers only once in the day to eat in haste and alone his half-commons of minced veal, and then earth himself again in the midst of precedents and reports. An occasional Sunday at the villa of his friend Dunning, who appreciated and loved to encourage the talents of his young countryman, an annual trip to Cambridge, and a visit to Eton at the Montem, formed the sum of his dissipation and delights. When challenged by Mr. Scarlett, in mature life, with not making proper allowance for the impatience of an audience, (he was prosecuting some people for a tumult in a theatre,) which that gentleman ascribed to his ignorance of theatrical matters, he repelled the imputation on his dramatic taste with some heat, and gravely declared that he *had been* in a theatre when a young man. He had gone there no doubt on some solitary festive occasion, looking like

<sup>1</sup> A country gentleman asked an eminent special pleader if he thought his son would succeed in that walk. “Sir,” was the pithy reply, “*can your son eat sawdust without butter?*”—*Edit.*

Cato the Censor at the Floral games. We ought, however, to include in his recreations the military mania, by which he was seduced from the desk for a season, and acted as lieutenant under Erskine, at the time of the riots in 1780. "We were very proud of our arms," he said; "regimentals we had not, but very proud we were of our muskets." This corps, as it consisted of lawyers, rejoiced in the *soubriquet* of the Devil's Own. They mustered about seventy, but the military pride of Lieutenant Gibbs was not shared by the recruiting serjeant who had undertaken the task of drilling them. He complained that he could never make the lieutenant turn out his toes. The front rank, we are informed by Mr. Espinasse, one of the troop, graduated down from six feet two inches to five feet three or four inches,—from Dampier to Vicary Gibbs and the Honourable Mr. Kenyon. These two were often put by the serjeant into the rear rank on account of their mean and unsoldierly appearance; and, as they were always paired off together, Dauncey gave them the whimsical names, from the Recruiting Serjeant, of Thomas Appleton and Costar Pearman.

But we must return with Gibbs from the spectacle of the field-day to the business of Term. We have read of an eminent judge, who said that he never knew of any one doing justice to the law, to whom the law did not in the end do justice; and his remark was verified in the instance of this eminent special pleader. He practised in that capacity nearly twelve years, organizing slowly, but surely, a large connexion: "When the attornies have no one else to go to," he remarked with fretful naïveté, "they come to me! Other pleaders have the luck of getting some easy cases. I never remember having had a single one. They were all difficult and complicated, and had nothing short about them but the fees." It requires no *Œdipus* to solve the mystery which puzzled him. He would not soften the hardness of his general manner to please either attornies or their clients, and therefore owed to merit, and not to favour, whatever cases were submitted to his inspection. He was, according to Lord Kenyon's description,<sup>1</sup> a rising young man of thirty-seven before he ventured on being called to the bar; and we would

<sup>1</sup> It was the late Mr. Justice Holroyd whom Lord Kenyon designated as a rising young man at the age of forty-seven.—*Edit.*

strongly inculcate the like prudent caution, though not to the same extent, on students of the present day. Had he assumed the wig and gown as soon as by the rules of the Inns of Court he was competent to do so, he might have lingered for years amid the gentlemen of the back row, with no opportunities of displaying the legal knowledge he had hoarded up; becoming more shy and nervous, and therefore incapable, each succeeding term, from the consciousness of being slighted—feeling that hope deferred which makes the heart sick and is an utter weariness to the flesh—betraying too much anxiety to embrace the favourable occasion with effect, should a chance opportunity of distinction present itself—perceiving his temper begin to fail and his spirit to harden beneath the burden of unavailing regret—“eating his heart out,” to use the expressive phrase of one who has suffered this suppressed agony, till broken in health and spirits he had been compelled to retire from the forensic ranks, crippled, and yet unwounded, the victim of ennui and neglect rather than of positive defeat.

Mr. Gibbs was called to the bar in 1788. He selected the Western Circuit, then led by Erskine, Jekyll, Serjeants Rooke and Bond; and was retained, almost as soon as he had joined, in heavy mercantile cases, and cases for a special jury. The newspapers of that day did not furnish the ready passport to fame which they now dispense to aspiring juniors, and failed to inform the public that Mr. Gibbs opened the pleadings, and occasionally examined in chief. By his pleadings in chambers, the familiar acquaintance with the Reports which he displayed in consultations, and by being, in technical phrase, up to the points of a case in court, he stood in a few years in high estimation within, though unheard of and unknown without, the pale of his profession. It was accordingly with considerable surprise to the public, with none whatever to the bar, that his name appeared in conjunction with that of Erskine, as joint counsel for Hardy and Horne Tooke, in the memorable State Trials of 1794. Mr. Tooke, than whom a more skilful or discerning defendant never stood on the floor of any court, himself a student of forty years' training, had made a particular request that he should be retained, for he foresaw what difficult questions of evidence and constitutional law were likely to arise, anticipated in some degree the length and latitude of the trial, and wished to temper the discursive eloquence and forensic

acumen of Erskine with the patient industry, careful investigation, and pleader-like habits of Gibbs. The event proved the felicity of his choice. There are no trials in our legal history which excited such intense interest, as well from the novel doctrine of treason sought to be established, as from the fearful magnitude of the decision, on which the lives and liberties of hundreds hung suspended. The prosecution of Hardy, a poor shoemaker who loved the title of Citizen Hardy and the dignity of secretaryship to the Corresponding Society, for the crime of high treason, was the first tried. The charge of constructive treason against the prisoner, divested of its legal phraseology, was this,—that under pretence of a parliamentary reform, and holding that out to the world as a mere colour and pretext, he had meditated a national convention, which should usurp the powers of the government and overturn the constitution of the country. To bring home this charge to the prisoner, it became necessary to investigate the sayings and doings of the society from its first institution and in all its ramifications, to scrutinize even its seditious songs, and thus spread a chaos of matter before the stunned ears and bewildered gaze of the jury. The proof of treason, which ought to lie in the palm of the hand, occupied five long days—a novelty unprecedented in the annals of our jurisprudence, harassing the mind and exhausting the frame. The opening speech of the Attorney-General, Sir John Scott, alone consumed nine hours. He was supported by a whole squadron of lawyers,—the Solicitor-General (Mitford), Serjeants Adair, Bearcroft, Law, Bower, Garrow, Hood, and the Hon. Spencer Perceval. In all the attributes of oratory, in the witchery of voice, eye, and action, Erskine was more than an equal match for the united forces of the crown. He spoke with sublime energy of “that most fearful season when the light and humanity of even an English public could not be reckoned on with certainty, *when the face of the world was drawn into convulsions*,” and declared with impassioned vehemence, that he would rather, at the end of all these causes, die upon his knees thanking God that, for the protection of innocence and the safety of his country, he had been made the instrument of denying and reprobating the doctrine sought to be established, than live out all his days without exposing it. But among

the jurors there sat probably several whose feelings and fancy were akin to those of the humble prisoner,—whose obtuse understandings, dazzled, but unconvinced, by the arts of the rhetorician, could only be subdued by a plain, honest, almost homely and common-sense view of the merits of the case. To this task Mr. Gibbs strained his whole strength, and declining all rivalry in the tricks of elocution, for which he was utterly unequal, with his gifted leader, drove to the head his solid facts, and hammered down closely on their minds whatever popular topics could be urged for the defence. He was overcome at first by a sense of the immense magnitude of the duty thrown upon him, and fainted away when he rose to address the jury, but recovered in a few minutes, and exclaimed, with a pathos which made itself the more felt from the previous exhibition of his sensitiveness, “Merciful God! how do we expect that thou wilt look upon us at the great day of judgment, if we thus scan the acts of our fellow-creatures!” “Annual parliaments,” he urged with great force, “and universal suffrage, are folly, I think, and I dare say you think so; but when such opinions are promulgated by noble dukes (of Richmond), that which is folly may reasonably be supposed to find its way into the mind of a shoemaker. . . . The proof to convict an Englishman of high treason must be plain, must be direct, must be manifest. The proof in this case is plain, is direct, is manifest, but it is all in favour of the prisoner. The proof offered to support the prosecution furnishes a plain, direct, and manifest case for an acquittal. I have no scruple to say,—unconnected with all parties, not having in my mind a wish on this subject, except as a counsel may be supposed to entertain some in favour of his client; but with respect to the public, not entertaining a wish except for public peace and public order, having never mixed myself in any political considerations whatever, having never connected myself with any set of political men, and studiously avoiding such connexions—living equally with men who entertain one and the other opinion on the subject of politics, I have no scruple to say, and I say it from the bottom of my heart, that I think a ruder shock cannot be given to the constitution of England, as far as it depends on a due administration of its laws, than by convicting this prisoner on this evidence.” The jury, without hesi-

tation, concurred in the propriety of these remarks, and by their verdict of acquittal saved the lives of many misguided men from a danger to which they should never have been exposed. Now that the excitement of those dark and evil days has passed away, moderate men of all parties have expressed their approbation of the verdict, and agree in opinion, that however misguided or seditious the conventionists might have been, traitors they were not, according to the letter and spirit of the English law.

Horne Tooke's trial succeeded, and to this the wagghery of the philosopher of Wimbledon lent a ludicrous air, reminding the spectator of one of Shakspeare's magnificent historical dramas, in which the gorgeous spectacle, passages of rare beauty, and incidents that stir the blood, are blended with punning dialogues, interludes, and farce; the block and axe of one scene being followed by the tricks of a merry-andrew in the next, till the audience begin to wonder whether they should laugh or weep. The reverend and learned defendant told anecdotes of a correspondent of his, one Oliver Verrall, who proved himself to be the Deity by the signature of his name, which was sometimes OVerall, and sometimes Verall I; reminded an adverse witness of his being unhappy because Mr. Pitt would not return his bow; played off his joke at the expense of a member of parliament, by asking if he was a gentleman's servant, and even offered to lay a wager, but immediately apologized on the angry exclamation of the Judge. But he raised no smile in the inflexible muscles of his junior counsel, who thus graphically personified his defence: "The charge against me is, that parliamentary reform was a mere pretext; that when I said I meant a reform in parliament, I did not mean it—that I meant something else. They have raked up all the passages of my life; they have endeavoured to prove, by a hundred different acts, with many of which I am not affected, that my real object was not a parliamentary reform; they have not proved that which they undertook to prove, and which they must prove before you can convict me—that I conspired with others to depose the King; they have put this case, that either I did that, or I meant parliamentary reform, and by putting it in that way they have given me the opportunity, which I am glad they have given me, of showing



by evidence what I did mean. I will let you into the whole of my character; I will let you into the whole course of my life: I will call those who have seen me in public and in private. I will show you what I have done at public meetings, where there were many who could prove how I acted; I will show you what I have said and done before those who were in my confidence, and who, if I had any sinister designs, must have discovered them. I will lay my whole life before you, as far back as the memory of man can go; and in order to show that reform was my real object, and that it was not a mere pretext, I will show you that my writings, my acts and conduct, do all manifestly testify that my opinion has constantly been, that the representation in the House of Commons should be reformed. I have had that, and that only object in view (and Mr. Tooke is proved to you, by many witnesses, to be a man firm, steady, and inflexible in his opinions)—I will prove to you as far back as memory can go, as far back as any of my acquaintance that are living can speak, that these have constantly been my opinions, and that I have uniformly acted upon them.” Mr. Gibbs closed his speech with a confidence that was warranted by the event. “I have not entertained a moment’s anxiety in this case because I have found my client perfectly safe; he must be safe because you are honest men!” Mr. Tooke, on being acquitted, immediately rose and returned thanks for the noble support he had received. The value of Mr. Gibbs’ services was feelingly acknowledged by Erskine, whose greatness precluded all mean jealousy of juniors, and who loved, with a native generosity of heart, to usher modest merit into notice. “I stood here,” he remarked in his concluding speech, “not alone indeed, but firmly and ably supported by my honourable, excellent, and learned friend.” He was interrupted for a time by the noise of some workmen, and resumed—“I am too much used to public life to be at all disconcerted by any of these little accidents, and, indeed, I am rather glad that any interruption gives me the opportunity of repeating a sentiment so very dear to me. I stood up here, not alone, but ably and manfully supported by this excellent friend, who sits by me.” From the triumphant procession which escorted Erskine home, the populace drawing his carriage and seeking to tear his gown into

shreds for relics, Gibbs quietly slipped away to the privacy of his chambers. But he returned to them a made man. Professional honours began to fall fast on the head of the successful lawyer; public bodies and commercial companies sought to retain him as their advocate, and the next few years became each an annual register of promotion.

On the death of young Burke he was gratified with the Recordership of Bristol, an office of high dignity and importance, which he valued exceedingly, not so much on account of its "pomp and circumstance," its salary of one hundred guineas and two pipes of wine, and its large criminal jurisdiction, as from the circumstance of its having been filled by Dunning, and always deemed an appanage of distinguished men. He received a silk gown, was gazetted as Attorney-General to the Prince of Wales, shortly afterwards kissed hands on being appointed Chief Justice of Chester, and in Hilary Term, 1805, received the honours of knighthood as Solicitor-General. With the spirit of a constitutional lawyer, he resigned his judicial appointment on being chosen one of the law officers of the Crown, and his example deserved, though it did not meet with, imitation. He retired from office in the following year, when the death of Pitt determined the existence of the ministry, and again, in the spring of 1807, succeeded Sir Arthur Pigott as Attorney-General, receiving for a colleague his old school-fellow and friend, Sir Thomas Plomer. His Alma Mater put the seal on these patents of preferment by expelling Lord Henry Petty in his favour, and electing him one of her representatives. He had sat in parliament two years previously for a close borough. "Never think of a seat," said Windham, "till you have pretensions to the rank of Solicitor-General." Gibbs acted unwittingly on this rule, for he had looked from youth up to his profession, had no taste for politics, and would have declined a seat altogether had it been etiquette in lawyers of his station to have done so. For he obviously felt that his place was not in the legislature; that few lawyers could aspire to eminence in that arena, as well as in the courts at Westminster, and except on legal topics, or questions connected with the duties of his office, seldom spoke, and probably never with much expectation of effect. That assembly of

gentlemen, never very tolerant of lawyers, required, before they would listen with complacency, more saliency of mind, and greater felicities of manner and diction, than an unimaginative and adust lawyer could supply. He had incurred the imputation of rashness by measuring weapons with Fox; and we read accordingly of his complaining that he would not be interrupted by vociferations, however offensive, and of the learned member for Montgomeryshire (Mr. Wynn) proving most satisfactorily, from his multifarious knowledge of the Journals, that every honourable member had a right to interrupt another, when advancing unsupported assertions. When the propriety of committing Sir Francis Burdett to prison was under discussion, Sir Vicary Gibbs argued that "a reprimand from the House would have no effect on one who had professed such an utter contempt for the authority of those who gave it. It would be like ordering him to receive a reprimand from his own servants, in his servants'-hall." The comparison was greeted with loud murmurs of disapprobation, and the Attorney-General sat down greatly disconcerted. His nervous system winced at those symptoms of impatience which a less sensitive speaker would have despised, and shrunk from those intelligible signs of repugnance which have been described as too plain to be mistaken—"the half-suppressed yawn, but so suppressed as to render it the more audible—the ominous banging of the green door, that give you pretty strong hints that you are likely soon to have only the Speaker and Serjeant-at-Arms for your audience—the cough, ambushed in the member's gallery, emitted from lungs that seem to have economised a month's inflation for one explosion." The complaint made against his great patron Dunning was objected to him with still greater justice, that his speeches resembled more the pleadings of the bar than the oratory of the senate—that he never spoke from the treasury benches but in the gown, and wig, and band of the lawyer. So difficult is it for the most expanded intellect to throw off the habits of a profession, that Windham's rule should be honoured in the breach, by all who would unite the honours of a senator with forensic fame. As a legislator, Sir Vicary's labours were comprised in one short but severe statute, which enabled the Attorney-General to hold defendants to bail against whom he had filed an ex-officio information. To all the propositions

of Sir Samuel Romilly for a reform in our sanguinary criminal code, he gave, both by his voice and vote, a steadfast opposition, urging that the possibility of inflicting death did operate as a prevention, but that he laboured under a disadvantage from not being able to produce instances, because what was prevented was never seen. He would not even admit the injurious effects of its being imperative on the Judge, by the then existing law, to pronounce sentence of death, though he might not have the remotest intention of carrying the sentence into execution. And when Mr. Morris told an anecdote of Lord Kenyon's passing sentence on a young woman, who fell senseless at the bar, (she had stolen a bank-note in a dwelling-house,) and of Lord Kenyon calling out in the most hurried manner, " Good woman, I don't mean to hang you—will nobody in court tell her I don't mean to hang her !" the hard and iron-hearted Attorney-General could not or would not see the ludicrous impropriety of the spectacle, but inferred from the story that the sentence would operate in many cases to deter individuals from future offences.

When the House of Commons resolved itself into Committee to investigate the charges which were brought by Colonel Wardle, at the prompting of Mrs. Clarke, against the Duke of York, Sir Vicary Gibbs, from his official station, took a prominent part in sifting the evidence and cross-examining the witnesses. However indignant at the base conspiracy by which it was sought to ruin a generous and high-spirited but imprudent Prince, we cannot fail to be amused at the dexterity with which that fair penitent constantly foiled by her voluble and sometimes witty assurance the saturnine and surly lawyer. The following are a few not unamusing instances:—

" Q. By whom did you send the request? A. By my own pen. Q. How did you send the letter? A. By the Ambassador of Morocco. . . Q. What do you mean by this Ambassador of Morocco? A. The ladies' shoemaker. . . Q. Who brought the message from the Duke to you? A. A very particular friend of the Duke's. Q. Who? A. One Taylor, a shoemaker in Bond Street. Q. What is your husband? A. He is nothing but a man! Q. Have you had any negociation or money transactions respecting promotion in the

Church? *A.* I never received any, but a Dr. O'Mearn applied to me. He wanted to be a Bishop. *Q.* Did you communicate his proposal to the commander-in-chief? *A.* No! he said that he had preached before his Majesty, and that his Majesty did not like the O in his name."

And again:—" *Q.* Do you often see Captain Dodd? *A.* What is meant by often? *Q.* More times than once? *A.* Yes, more times than once, if that is often." But the laugh at the expense of the learned gentleman was not raised at his expense alone. The late Secretary for the Admiralty, Mr. Croker, was so overcome by the nonchalance of the ready-witted dame, as to inquire, " Did you sign any name to this anonymous letter?" whilst another Irish member, to enhance still more the reputation of his country for blunders, rose to inform the House of the startling indecorum, that a certain witness had been ordered to withdraw from the bar intoxicated on the motion of an honourable member. But the whole affair formed a saturnalia for our legislators, who were delighted with seeing the grave Sir Vicary out-witted, and caricatured, and chronicled, the butt of ballads and lampoons. It must be confessed that the periodical press only took a natural revenge in refusing quarter to their sworn enemy when caught at disadvantage, for never, since the days of the Star-chamber and licenser, had there appeared an Attorney-General more able and willing to wage internecine war with the whole race of editors, sub-editors, copyists, and penny-a-line men. If poor Defoe, who wrote hymns to the Pillory, and odes to Newgate, had been living in his day, he could not have found a patron more worthy of the soft dedication than this ruthless filer of ex-officio informations. There were in his time no less than fifty-two newspapers published in London, one half of which are said to have been at one and the same period under prosecution. He had them all, to use a colloquial phrase, in a cleft stick. If the editor apologized for the libel, his apology came too late, for the Attorney-General would not allow him " first to calumniate a man and then to nauseate him with flattery." If on the other hand the unhappy author made no apology, he confessedly deserved punishment as a hardened offender. Equally futile was the plea that the libellous paragraph had been copied from another paper. Sir Vicary must

controvert the injurious idea that the copyist was not culpable. There was scarcely a case in which he did not consider the copyist more profligate and wicked than the original author. This reign of terror formed the subject of repeated motions in both Houses of Parliament. In March 1811, Lord Folkstone brought forward a motion for an account of all prosecutions for libel by information *ex-officio*, since the 1st of January 1801, grounding the necessity for inquiry on the fact of their enormous increase. From 1801 to 1806 there were fourteen such prosecutions; in 1807 there was not one; in 1808 to 1810 there had been filed no less than forty-two; the yearly average of informations in the former period being two, in the latter fourteen. The complaint of undue severity was enforced in the House of Lords with apparent reason by Lord Holland, who moved certain resolutions, one to confine the filing of *ex-officio* informations within the lapse of a certain period after publication; a second, that it be compulsory on the Attorney-General to bring the matter to trial within a certain period, or to state to the Court the reasons why he did not, and that after a verdict against a defendant, judgment should be prayed against him within a certain period. In addition to these resolutions he stated, that he should have been prepared to move a censure on the Attorney-General, but for the estimable qualities which he understood him to possess in other respects. The motion was rejected by a majority of twenty-four to twelve, the Chancellor, Lord Eldon, expressing surprise at the clemency of the individual complained against, by a similar idiosyncrasy of understanding with that which led Lord Redesdale, on a subsequent occasion, to make his own despatch in deciding causes matter of astonishment. But, though silenced in the legislature, the voice of public opinion made itself heard in the remonstrances of the bar, and the indignant denunciations of the journals. The present Lord Abinger, then Mr. Scarlett, mentioned in Parliament that he had been present on one occasion in the King's Bench when twenty people were brought up for judgment, every one of whom was as little involved in any participation of the moral guilt of the offence of which they were convicted as any honourable member of that House. Among them were several women, who lived in different parts of the country, and whose only connexion with the offence was

that, having annuities on newspapers, their names, as required by Act of Parliament, were lodged at the stamp office as joint proprietors of those papers. They all received sentence, not indeed a very severe one—they were fined £20 a piece; but still the prosecution of such persons argued an activity on the part of those who prosecuted them, which excited strong sensations, and not of approbation, in Westminster Hall. The Times newspaper, which then, as now, “wielded at will the fierce democratic,” and smote its oppressors with the editor’s heavy flail, recorded the following energetic protest against the conduct of the undeterred but unpopular Attorney:

“On Lord Folkstone’s motion, not a creature stepped forward to assure the House that there was nothing of a rancorous or persecuting spirit in this law officer, which should induce the belief that he was capable of acting with peculiar barbarity. In a debate of six hours, the man at whose mercy the comfort and freedom of so many are placed, found none ready to bear evidence to the general clemency of his disposition. At any future time, when a reformation of the law of libel may be attempted, it will not be necessary to say that *ex-officio* informations may be carried to a great extent, and in cases where no public danger is apparent—that they may be hung in great numbers over the heads of subjects without being prosecuted to judgment—that unconvicted and untried men may thus be punished in their feelings and spirits and properties,—and that therefore, on such supposititious cases, a power which may be thus exerted in detriment of public liberty and professional independence ought to be circumscribed:—it will be sufficient, to prove the propriety of some change, to turn over the Parliamentary Reports, and to show from thence, that one Attorney-General has, on his own confession, in a time of profound internal tranquillity, filed informations against seventy persons in three years, whereas, in the thirty years preceding 1791, only seventy persons had been prosecuted altogether; that on a general average, this same Attorney-General had filed in the proportion of seven to one more than his immediate predecessors, and (which is of more consequence than all the rest) had prosecuted to judgment, either of conviction or acquittal, not more than seventeen of the forty-two informations which he thus filed: thereby levying on every object of

the other informations, be they many or few, a heavy extra-judicial penalty of anxiety and care and cost according to his own discretion, and diffusing over the whole British press a system of apprehension that can scarcely be conceived."

A complete history of these prosecutions would occupy too large a space; it will suffice, that the reader may catch a glimpse of their general spirit, to give a sketch of one or two of the most characteristic. The trial of William Cobbett for libel, in June 1810, deserves especial mention. He had taken for the motto of his Register a passage in a newspaper: "The mutiny among the Local Militia, which broke out at Ely, was fortunately suppressed by the arrival of four squadrons of the German Legion cavalry. Five of the ringleaders were tried by a court-martial, and sentenced to receive five hundred lashes. A stoppage for their knapsacks was the ground of complaint which excited this mutinous spirit."

We may explain, that these sons and servants of farmers had demurred to march without being paid a guinea. Lord Castlereagh had shortly before introduced a bill calling out the local militia, and Mr. Wardle had proposed to disband the German legion. On this short statement of facts Cobbett wrote the following highly spirited commentary: "See the motto, English reader! See the motto, and then do pray recollect all that has been said about the way in which Buonaparte raises his soldiers. Well done, Lord Castlereagh! This is just what it was thought your plan would produce! Well said Mr. Huskisson! It was really not without reason you dwelt with so much earnestness on the great utility of foreign troops, which Mr. Wardle appeared to think of no utility at all. Poor gentleman, he little imagined how a great genius might find employment for such troops. He little imagined that they might be made the means of compelling Englishmen to submit to that sort of discipline which is so conducive to the producing in them a disposition to defend the country at the risk of their lives. Let Mr. Wardle look at my motto, and then say whether the German soldiers are of no use. Five hundred lashes each! Aye, that is right, flog them! flog them! flog them! They deserve it a great deal more. They deserve a flogging at every meal-time. Lash them daily, lash them daily! What, shall the rascals dare to



mutiny, and that too when the German legion is so near at hand! Lash them, lash them, they deserve it. O yes, they merit a double-tailed cat! Base dogs! what, mutiny for the sake of the price of a knapsack! Lash them! flog them, flog them, base rascals! Mutiny for the price of a goat-skin, and then, upon the appearance of the German soldiers, they take a flogging as quietly as so many trunks of trees. I do not know what sort of a place Ely is, but I really should like to know how the inhabitants looked one another in the face while this scene was exhibiting in their town. I should like to have been able to see their faces, and to hear their observations to each other at the time.”—“I here impute to the defendant, said Sir Vicary Gibbs at the trial, “that he charges the government with cruelty,—that he charges the military authorities with cruelty,—that he suggests to mutineers the injustice of their sentence, and that he ridicules the patience with which they endured their punishment.” The defendant avowed, in his address, a strong jealousy of the employment of German troops. “The graves of their fathers, and their property (if they have any) lie in Germany, and there are their affections also. My indignation was excited at their being employed, as I thought, indecently, in witnessing, if not assisting, in the flogging of Englishmen. In my hasty observations on this subject there may have been much bad taste, and many things which cannot bear the test of literary criticism; but I trust you will believe there was no bad meaning. My property, the profits of my publications, the very trees of my planting, all depend on the security of the country under the government of His Majesty and his successors; and I must be the greatest beast and fool, as well as knave and traitor, if I could seriously and deliberately intend the subversion of the government, or to do any injury to the country.” The Attorney-General, in his reply, was peculiarly keen and cauterizing. “The defendant said he was brought up to London, and told, when he came there, I won’t try you now, go back again and come up another time. For this assertion there was no foundation, no more than for any invention which might spring from the wildest imagination of the wildest person. I am sorry to say that it is a dry cold invention, made only for the purpose of serving this trial. No

man was ever so calumniated as he has been. I am not sure that he makes a very accurate distinction between the active and passive voice." The jury found him guilty. He was sentenced to pay a fine of £1000, to be imprisoned in Newgate two years, and to find sureties, himself in £3000, and two others in the sums of £1000 each. The earth has been freshly heaped on the body of this extraordinary and misguided man, the most idiomatic writer of English since the days of Swift, and a feeling of compassion may tinge with some degree of prejudice our view of the sentence. Notwithstanding his versatile politics and virulent libels, we cannot but entertain some sympathy with the strong John-Bullish spirit which provoked his punishment, and cherish a lingering regret that two years of a life which might have been spent with profit to society, should have been wasted away in the squalor and misery of a gaol.

Not content, however, with hunting down this more noble quarry, the Attorney-General seems to have joined with ardour in the chase of such small deer as debating societies and bill-stickers. The report of his prosecution of Gale Jones for a libel would excite a smile from the weakness of the defendant and his counsel, were not its character redeemed from the ridiculous by the eloquence of the presiding judge. This Jones was manager of a debating society, and had covered the walls of the metropolis with a silly placard, "British Forum, Bedford Street, Covent Garden. Monday, January 29th 1810. Question, Whether Lord Castlereagh's order for the seizure of Mr. Finnerty, on the expedition to Walcheren, is to be considered the result of a wise and salutary caution for the discipline and order of his Majesty's forces, or a flagrant violation of the principles of a British subject, and a cowardly attack on the character of an innocent individual?" Another placard was published, proclaiming to the public that on the preceding Monday Lord Castlereagh was found guilty of a gross and malicious attack on the freedom of a British subject, in the detention of Mr. Finnerty. A Mr. Jones, apparently a pupil of this interesting academy, defended his namesake. He said that he rose with many a blush and conscious fear, but that his motive was his support. "For how could I see the victim who is now at my

back without pitying him, without feeling my very heart's blood burning in the noble and sweet cause of dejected humanity? But I would have you to know I am no relation of his; my client is a Middlesex man, I come from Carmarthen in South Wales, and so I can be no relation of his. I admire debating clubs, gentlemen, for constitutional knowledge. When I was at Kiel, in the North of Germany, studying law there, Professor Olivarius told me, it was not our free press, but our parliament, and still more our debating societies, which made this country free. I entreat, gentlemen, you will acquit my client, if it be only to set my mind at ease." This amusing picture of stolid naïveté was thrown into strong relief by the master-mind of Lord Ellenborough. "The professor, of whom the learned counsel spoke, must have taken a very narrow and idle measure of British freedom, when he conceives that any part of it was due to clubs of this order. I love free discussion. I would see no restraint and no limit to the free examination which men would make for the sake of truth. I may be inferior to my predecessors on the bench in many things, but in this I am not their inferior. I love inquiry into all that concerns the public interests or private happiness of man. While I have sat here no restraint has been laid on fair investigation, nor shall it ever while I sit here. It is the wish, the most entire wish of my heart, to give perfect freedom of thought and word within the wise boundary of the laws. The press of the country is no longer subjected to a licenser; it is free, but if the writer will abuse its freedom to the injury of others, he loses the benefit of his privileges, and acts at his peril. Men will be malignant; and human life would be unsafe, and human happiness a name, if every man had the power of forcing his neighbour before the eye of the world, stripping him of the privacy which our laws still reverence, and throwing his fame and feelings at the mercy of the thousands who will rejoice to insult him, because they have the power to give him pain." The jury instantly convicted the poor wretch, who atoned for his impertinent vanity by an imprisonment of twelve months. There can be no question as to the impolicy of this and similar prosecutions. It was the vindictive power of government wasted on an insignificant

and therefore innoxious object—a thunderbolt striking and buried in the clay!

In other cases, the excessive zeal of the Attorney-General, which sustained repeated defeats, betrayed him into the prosecution of such apparently innocent paragraphs as that which follows:—"What a crowd of blessings rush upon one's mind that might be bestowed in the event of a total change of system! Of all monarchs, indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular!" "No man can doubt," said Sir Vicary, "that such language must have a manifest tendency to alienate and destroy the affections of the people towards their sovereign, and to break down that link of love which ought to connect the king and his people in the tenderest ties." The judge and jury had no doubt, but not in the sense the counsel intended; they were satisfied of the innocence of the sentence. "What is this," said Mr. Perry, who ably defended his own cause, "but what happens every day in colloquial discourse, when it is a common flattery to say to a youth, in the presence of his parent, that you wish he may be a better man than his father?" Had such a prosecution succeeded, it would have been dangerous for the editor of a newspaper to have reported, in the list of toasts at a public dinner, one which was not unpopular at that period: "God save the King: The Prince of Wales *for ever!*" We shrewdly suspect that the present editor of the Morning Chronicle would have considered the libellous paragraph too tame and spiritless for insertion.

The effect of the public indignation, which Sir Vicary Gibbs by this and similar displays of tyranny excited, has been to deter his successors from a fair exercise of their duty. His immediate successor, Sir William Garrow, seemed to think that frequent prosecutions for libel did more harm than good, and in four years there was but one criminal information,—for a libel on a member of the royal family. Sir Samuel Shepherd filed ten informations, and Sir Robert Gifford ten. Lord Lyndhurst may be said to have worn white gloves during his continuance in office, for he did not institute a single proceeding. Indeed, from 1822 to 1829, there was almost a total cessation of prosecutions for libel, not because they

were not rife and aggravated, but because it was thought wiser policy to let them alone. There is no nicer problem in politics than to determine how far libels ought to be tolerated—when forbearance is salutary, regard being had to the temper of the times, and of juries—and the point at which it should end. Total forbearance on the part of government may produce greater evils than even reiterated acquittals. Public opinion appears to have established the principle that prosecutions for attacks on religion ought to be instituted seldom, and with extreme caution, and that obscene publications, however offensive to decency, should also be left to perish in their obscurity, or consigned to the chastisement of the inferior tribunals; and that the power of an *ex-officio* information ought not to be pressed on ordinary or inadequate occasions. The sword of state must not be borne before the officers of justice at every trifling instance and request, but at solemn seasons, or as an instrument of terror it will be borne in vain. Still it must not be suffered to hang up and rust. The Attorney-General is bound to protect the honour of the Crown and peace of the country; by virtue of his office he should put down the publication of opinions dangerous to the existence of government, and shield public characters from malicious calumny. That law officer of the Crown betrays his duty, and deserts his trust, who concedes, through supineness or moral cowardice, a positive impunity to libellers.

That Sir Vicary Gibbs acted from a stern sense of justice will be admitted by all who are acquainted with his peculiarly sensitive character. His excitable temperament, irritated by the least puncture, must have endured a species of self-inflicted martyrdom, when stung by the hornets of the press. Unlike his compeers at the bar, most of whom had the reputation, perhaps not unjustly, of being stern, insensible men, he was peculiarly anxious about the good opinion of the world. A proof of this excessive sensibility was early shown at Hardy's trial, when Chief Justice Eyre complained of his sending for Mr. Erskine to interpose; and it required a repeated observation from that model of judicial courtesy, on his complaining that he was deeply mortified,—“I am extremely sorry for it, I never wished to mortify you,” to sooth his ruffled spirit. When twitted in court with having

subscribed to a new translation of Lucretius, the most argumentative and inductive work against the immortality of the soul and the providence of the Divine Being, the sensitive Attorney-General would not let it go forth to the world that he was sanctioning such doctrines, when Lord Ellenborough, with more presence of mind, interposed, observing, that he need not give himself the trouble of explaining; for as well might it be said that every gentleman who subscribed to a new edition of the classics was the favourer of these doctrines. But an account of a prosecution for libel, in 1808, which he led against that reckless lawyer Clifford, will best display the true character of the man,—his object in commencing a hopeless crusade against the press—the kindly spirit that was too constantly clouded by waywardness of temper—his ever-wakeful irritability, and his anxious desire to atone for an unpremeditated wrong.

The defendants were indicted for a libel on Lord Ellenborough. In his opening speech Sir Vicary alluded to his college friendship with the noble lord, and alluding to the career of libel long pursued by the defendants in their paper, the Independent Whig, remarked, "It is only the licentiousness of the press I wish to restrain, and if I should find these persons returning within the pale of their duty, uttering only such doctrines as a man in my situation can suffer unrestrained, I can assure them they will never find me their enemy; but I can also assure them that my abstinence has not proceeded from any consideration which will prevent me, if they persevere in the conduct they have pursued, from applying the utmost strength of the law to stop their career. I hope it will not be necessary,—I wish it may not,—I have great expectation that it will not, knowing, as I do, the learning and good sense of the gentleman to whom they have entrusted their defence." A part of the libel which said,—"I suppose his Lordship is not a father; I should almost question his ever having been a son, if there had been any other mode of coming into existence,"—created some laughter, which, according to Sir Vicary, degraded those who indulged in it below the standard of rational beings. Clifford sneered at his mention of school-boy days, scoffed at his phrase "abstinence," and that defendants must behave themselves to his liking. "He is, forsooth,

such an extremely merciful Attorney-General! He would have better consulted his duty, the dignity of his office, and his professional character, in altogether forbearing to introduce such topics." Sir Vicary Gibbs rose to reply in excessive wrath. "With respect to what has been stated by my learned friend—I correct myself, I should say, by the learned gentleman,—the fallacy of the argument the learned gentleman has used could not have escaped the vigilance of even an attorney's clerk. I will tell you, gentlemen, why I recall the expression of my learned friend. There is no courtesy I would not show,—no expression of kindness I would not use upon any occasion towards any gentleman of the profession. But after the manner in which he has addressed you as to my conduct in this case, it would have been mean and abject in me to have given him that appellation. He said 'the Attorney-General thinks lightly of an Englishman being confined in irons, for he has told you that that gentleman, by being kept in irons all night, has suffered no inconvenience.' It is a grave imputation against me; it deeply affects my moral character; it invades my claim to that which I must be most anxious to possess, namely, the good opinion of good and moral men. I must deserve to be an outcast of society if such a sentiment could be justly attributed to me." He explained that the man had been subjected to no incidental inconvenience beyond the circumstance of his having been confined in irons, and called on the learned gentleman for an explanation, which Mr. Clifford reluctantly made. "So then my learned friend, for I will now call him my learned friend, adopts my meaning. I can feel for the situation in which my honourable friend is placed. I have heretofore been placed in the same situation myself. I know the difficulty of finding plausible topics on which to address a jury; and when we cannot find wise ones, we must sometimes have recourse to foolish ones. To be sure, the inference he has drawn with respect to my notions on such a subject, is as weak a one as ever was urged." Having thus figured as Sir Fretful, the learned Attorney continued with cruel mercy, but real kindness of intention, to correct what he presumed to be a mistaken impression. "I cannot but have observed, from a smile on your countenances, that you conceive I meant to impute to my learned friend that he was

the author of these letters. I meant no such thing. I should think it was very unworthy of me to say anything that might seem to justify such an imputation, after having made the observation I have made on an unintentional misrepresentation of myself. I should be sorry to leave an impression on your minds that these papers had proceeded from the pen of my learned friend. I believe he would deem such publications unworthy of him—I believe he would not like an assassin attack people in the dark. I believe, if ever he did publish a strong paper, he would put his name to it. I should hold him to be the basest coward, and most unworthy the rank he holds in society, if he could bring himself to the dastardly practice of feeding the columns of a newspaper with libels against Lord Ellenborough, filling the situation in which you so often see him acting for the public benefit. I thought it necessary to do my learned friend this justice." His learned friend might have retorted upon him the words of Shakspeare, "Marry, Sir, you are over-gracious."

Sir Richard Phillips, the bookseller, and once sheriff, relates an anecdote of Gibbs, the self-complacent tone of which will be detected by the reader, but which evinces much goodness of heart, marred indeed and blurred over by ill humour. "Sir Richard Phillips (he writes of himself in the third person à la Cæsar) was a witness in a cause in which Sir Vicary asserted in his coarse way, that if any publisher bought a book without consulting the reviews in regard to former works of the same author, he was the greatest fool in Christendom, and ought not to be allowed to walk about without a keeper. Sir Richard, however, said that he never read them. A few days after, both were in the drawing room at St. James's. Sir Vicary Gibbs at a great distance, across a crowd of heads, recognized the sheriff by a continuance of cordial salutations, which were at first gravely received and not returned; but in a few minutes he bustled through the throng and held out his hand. The sheriff smiled, and remarked that after all which had passed in the papers, it was strange to see them in that attitude. 'Pshaw, Sir, do you think I regard newspapers?' 'Yet,' rejoined Sir Richard, 'you have as great an interest in them as a publisher in reviews.' 'You are right, you are right, Sir, but you must not expect a pleader to be always logical. The man must be dis-



tinguished from the advocate ; I hope we are friends and shall continue so." Unusual, and probably ungraceful as this reconciliation and interchange of civilities must have appeared in the presence-chamber, Sir Vicary evinced the spirit of a gentleman in his desire to conciliate the magnificent high sheriff, whom he believed that he had justly offended. There was an undergrowth of kindly feelings, but a restless, anxious temper disturbed the surface. "Society," says the author of "My Contemporaries," "did not hold a more disagreeable man. Sneer and ill nature appeared to have taken settled possession of his countenance, to form the leading traits of his character, and he exercised both with untired perseverance. His laugh was an hysteric affection, unmarked by cheerfulness or good humour, and although my intercourse with him in the profession was frequent, and in business time I was in the daily habit of seeing him, I do not recollect ever to have observed a ray of pleasantry pass across his countenance. He stooped occasionally to be what he thought gracious, but he wished to have it considered as condescension. This made his civility disgusting, as it was accompanied with an air of assuming superiority: it seemed to be a reluctant homage which he paid to the settled rules of decent civility, not the offering of good nature, good feeling, or good manners. This majesty of bearing was displayed upon all occasions, but chiefly at his consultations. After stating his own view of the case, he went through the ceremony of asking the opinions of the other counsel in the case who attended him. He received their answers with a simper of affected acquiescence; but it was evident that he paid no attention to their suggestions or opinions, and had made up his mind to act wholly upon his own. The exercise of this prerogative of absolute judgment was not confined to those who were his juniors and without rank; silk gowns and coifs came in for an equal share of it. In one instance only do I recollect to have observed him relax his unbending superiority; it was at a consultation at which Mr. (now Sir Edward) Sugden attended him as one of the counsel in the cause. It would be unjust to deny that on that occasion he violated his second nature, and treated Mr. Sugden with civility and his opinion with respect. It was on a question of real property, in which he condescended to think that

Mr. Sugden might be as well informed as himself." The leader of the *Nisi Prius* bar against Gibbs was Topping, an austere and haughty man, but his pride was never displayed in his intercourse with the members of his own profession. Entitled, however, to some station and rank in society, he ill brooked the upstart assumption and irritating peevishness of his rival. He tolerated it long, though his pride was evidently suffering from his forbearance. He seemed unwillingly, from a respect to his profession, to keep down his resentment and curb the public expression of his feelings; but an occasion occurred which overcame his resolution, and rendered him unable longer to control them. His indignation was roused at a trial at Guildhall, in which he and Sir Vicary Gibbs were counsel at opposite sides. He observed on the assuming tone and manner adopted by Sir Vicary in the most pointed and indignant language, and concluded with the emphatic delivery of the lines from the speech of Cassius in *Julius Cæsar*:—

"He doth bestride the narrow world  
Like a Colossus, and we petty men  
Walk under his huge legs  
To find ourselves dishonourable graves."

This was accompanied by an angry look of ineffable contempt; and the figure and manner of Topping, contrasted with the meanness of Sir Vicary's appearance, gave force to the reproof, and all the Bar present joined in the opinion of the justness of it.

Unpopular in his own branch of the profession, the Attorney-General could not boast of being a greater favourite with solicitors, especially the worse part of them. For though the temper of the man might be bad, and his manner hard, ungracious, and repulsive, his was not the abject spirit to truckle to those who had power in their hands, or to speak in honied speech to an efficient patron. If the action was founded in folly, in knavery, or in both, he never failed to acquaint its aiders and abettors with his opinion. His forensic bitterness always assumed its harshest tones when denouncing, as he termed them, the prowling jackals, the predatory pilot-fish of the law. One of this class chanced to be standing near him as he was addressing the jury, when, suddenly turning

round, he rivetted the attention of the whole Court on his victim:—"Does any of you want a dirty job to be done? There stands Mr. (naming the individual) ready and willing to do it." The presiding judge interposed, but Sir Vicary persisted. "I will not be silenced. The fellow deserves to be exposed, and I will expose him." On another occasion, an attorney having brought a very thick brief to his lodgings in the assize town very late at night, was about to make his bow, when Sir Vicary Gibbs grasped the huge mass of paper, and inquired, "Is all this evidence?" "No Sir," replied the attorney, "there are forty pages containing my observations." "Point them out." He then tore these pages from the rest, thrust them into the fire, and concluded the interview with the sarcastic remark, "there go your observations."

Mr. Espinasse, who appears to have imbibed a bitter prejudice against Gibbs—the prejudice is not to be wondered at in an Irishman fond of fun and merriment—speaks more disparagingly than they deserved of his abilities as an advocate. "As a leader at *Nisi Prius*," he says, "his powers were contemptible: subtlety in an address to a jury is wholly misapplied, and nicety of distinction is a mere waste of words. The speeches addressed by him to juries were neither calculated to persuade, to convince, or to produce effect. They were laboured displays of studied ingenuity, too refined for the apprehensions of those to whom they were addressed. To be convinced, we must not only hear but understand. He divided, distinguished, and defined, until his speeches became logical enthymemes, through which the juries were incapable of following him. His voice was shrill, sharp, and unmusical, and he never tried the experiment of aiming at persuasion by softening its tones: he punished the ears of those whom he addressed in a tone of objurgatory expression, resembling that of an angry scold, when, as was generally the case, he could neither command their attentions, nor convince their understandings. No joke or sally of wit was ever known to escape him; and to any thing bordering upon pleasantry he was not only an utter stranger, but his countenance prohibited every attempt at it by others." The above criticism we consider to be greatly exaggerated; the attorneys, who generally consult with much shrewdness the interests of their clients,

held a different opinion. In the very zenith of Erakine's fame, Gibbs shared with Law the honours of rivalry, and on the retirement of these great opponents became the acknowledged leader at Nisi Prius. He could not, it is true, be compared with them, or even with Best or Dallas, as a finished rhetorician and "damage-broker" in those actions which came nearest home to the business and bosoms of men—actions for malicious injuries and cruel wrongs, actions to try the validity of a will, for breach of promise of marriage, for criminal conversation, or seduction. His education as a pleader made him look with too technical an eye on the legal requisites for maintaining an action, and his sympathy with the father's sorrows for the bereavement of his child was blended with an anxious solicitude to prove an actual loss of service—that the unhappy young woman had actually done some domestic duty—had made tea in her father's house. The language of love was as strange to him as the contents of a novel—he had never read and knew not the strange characters in which its history is written. Hence his confident assertion, the truth of which might be questioned in a female circle, "that it was preposterous to imagine a girl of seventeen knew any thing, could know any thing, of love." On those occasions which crowded the King's Bench and Guildhall to the doors—which awakened the sympathies of the chance audience, who came as to a theatre of amusement, and extorted tears from my Lord Kenyon, Mr. Gibbs was rarely employed, and rarely successful. But every frequenter of a court of justice knows that the vast majority of causes are those which in their nature do not interest the feelings—cases of contract, which give opportunity for clear, logical statement—for legal subtleties and forensic ingenuity, and in which sometimes the most skilful tactician carries the day.

Of that useful qualification for a Nisi Prius leader, a fund of humour, he was wholly destitute. He had the honest Johnsonian dislike of a pun; had never in his keeping a first or subsequent edition of Joe Miller, and could as soon have led off at an assize-ball with the daughters of the grand jury, as have moved the muscles of the petty jury by quips and cranks and wreathed smiles. The grave Attorney-General capered in sad fashion when he tried to be jocular, as the fol-

lowing instance will show. "A clergyman, who was refused a licence to a lectureship by his diocesan, because he had preached against infant baptism, applied to the King's Bench for a mandamus, and filed affidavits, that such was the effect of his sermon upon others, that they immediately had children baptized in whose case the ceremony had been omitted. This denial reminded him, the Attorney-General, of a nurse who in cutting some bread and butter for a child, happened to let the bread fall, and exclaimed in a pet, "rot the loaf;" the child reported the exclamation to her mother, when the nurse not only denied that she had used these words, but declared herself to have said "bless the bread!"

Though denied the faculty of facetiousness, Gibbs could wield with the fatal skill of a literary Teucer, the poisoned arrows of sarcasm and contempt. He led an action against the underwriters for total loss with benefit of salvage; a large rat hole, it appeared in evidence, had been discovered under the starboard bow. Upon this Erskine told a story of a bill of Chancery filed to discover the cause of a ship's unseaworthiness. The equity draftsman who drew it had propounded these questions: "And that the said defendant may answer and set forth what number of rats were in the said ship, and whether they might not have eat holes in her timbers, and if not, why not? and whether all, or any, or which of the said rats had tails, or if not, why not? It was thus his friend, Mr. Cooper, had exercised his wit in ridiculing the desultory pleadings of Courts of Equity. But the rat in question was so malicious an animal, that it waited till the moment the ship got to sea, and then said to itself, now I have you, now I'll do for you, and so gnawed away the bottom." Mr. Gibbs had covered his face with his hands as if in disgust at so much silliness in a heavy insurance case, and observed in his most freezing tones—"Out of regard to my learned friend, I pass over in silence those inane puerilities, which are too absurd for even ridicule to smile at!" The jurors could scarcely dare to laugh after this.

A favourable specimen of the facility and virulence with which Gibbs could give what Judge Jefferies used to call "a lick with the rough side of his tongue," is presented in the trial of *Dubost v. Beresford*. The plaintiff's case was shortly this. He came to ask damages for a violent demolition of

property. He was a French artist, and had formed an exhibition in Pall Mall, and showed, among other paintings, one from the old Arabian tale of Beauty and the Beast. The Rev. Mr. Beresford, described as a reverend Vandal, and son of the Archbishop of Tuam, cut the picture in pieces. The plaintiff valued it at 1000 guineas. "The functions of the defendant," said Mr. Jekyll, "should have taught him other conduct: *Tantæne animis cælestibus iræ!*" The Attorney-General, for the defence, rushed at once *in medias res*. "This is the most impudent appeal ever made to a British jury. This foreigner claims the protection of the laws; he should not have begun by insulting them. Dubost found in Mr. Hope a most liberal patron; he gave 800 guineas for this painting, which constituted all this *ruffian* was worth in the world. (The plaintiff, who was in court, made some movement as if in contradiction.) I perfectly know what I am saying, and I cannot suppress my indignation at the insolence of this *fellow*, this true original for his own *beast*, who dares to continue in court during this trial. What was this fellow's conduct? he lived at Mr. Hope's for a length of time, and he employed his time in taking opportunities of future insult to his benefactor. He made large demands on Mr. Hope's liberality, and there is no man more liberal. It was found necessary to get rid of this importunate *beggar*, and then the *reptile* took his revenge; then it prepared to sting its benefactor, and a most amiable and admirable lady, in the tenderest point. He had the insolence and ingratitude to caricature them. (Mr. Hope was caricatured as a beast, with an eye-glass round his neck, having his paw on a chest of jewels. In the beast's mouth there was a scroll with these words, "I am sensible I am a horrible beast, but if you will accept my hand, all these riches shall be yours." Mrs. Hope was wringing her hands.) This was offensive in the extreme, and nothing could be more untrue than the insinuation. Mrs. Hope's brother, indignant at the injury which his sister's feelings must sustain, indignant at the scandal which was hourly thrown on his own family, put an end at once to the picture. What was the injury sustained by Dubost to that which he had meditated against an honourable man and his family? What was the object of this action? The plaintiff knew that

nothing could be more galling to the feelings of Mr. and Mrs. Hope, than to be brought a second time before the public, to have themselves talked about, and their whole domestic life canvassed. He brought this action only to extort something more from the delicacy and wounded sensibility of Mr. Hope and his wife. But the jury would disappoint him. It was even by Mr. Hope's permission that the plaintiff was at that time sitting in the court. Mr. Hope might have brought his action, and if his (the Attorney-General's) advice had been taken, the reptile would be prosecuted for his libel. An action would have extinguished the picture: but if a man holds a sword to my throat, am I not to beat it down? Was Mr. Beresford to see the slow finger of scorn pointing at his sister without taking any steps to abate the nuisance? He could not afford to wait for the tardy proceedings of the law." Lord Ellenborough pronounced the picture to be a libel, the exhibition of which would have been stopped in five minutes by application to the Chancellor. It was more than probable that an injunction would have been issued to prevent the picture's being ever exposed to sale. The plaintiff therefore lost all right to consider himself aggrieved by diminution of profits from his exhibition, or even by the destruction of his picture. They were means of unlawful profit, and therefore no compensation could be provided by the law. The picture in its perfect state could only be looked on as an instrument for the production of punishment, and the jury would resolve their damages into those of the mere wax, canvass and colours. The jury awarded the plaintiff 5*l*.

Sir Vicary Gibbs excelled in a reply, that trying test of ability in an advocate. When praying judgment in full court on prisoners convicted of some heavy misdemeanor, and rebutting the arguments urged in mitigation of sentence, he was accustomed to display no less virulence than acumen. With an extract from one of these bitter harangues we shall conclude our specimens of his oratorical merits. When Colonel Draper was brought to the floor of the King's Bench to receive judgment for a libel on Mr. Sullivan, after Mr. Dauncey and others of counsel for the prisoner had argued ably in mitigation of punishment, the Attorney-General thus retorted their arguments. "My lords, Colonel Draper is

certainly much indebted to my learned friend Mr. Dauncey, for that consideration which he has desired the Court to have of the defendant's feelings. No man seems to be more alive to any insinuation against his own character than Colonel Draper. No man is more impatient or restless under the charge that it should ever have occurred to his honourable mind to publish of Mr. Sullivan not what was not true, but what the Colonel did not believe to be true. He feels that the finest feelings of a soldier, a man of honour, and a gentleman, are outraged. He feels that life is not worth supporting, whilst such an imputation remains upon him. I wish, my lords, that he had had the same consideration for Mr. Sullivan which he desires your lordships to have for himself. I wish, that notwithstanding the care which my learned ~~friend~~ gives him the credit of having ~~taken that~~ nothing should be published lightly against Mr. Sullivan, that he had had a little more of that care. I wish that he had proceeded somewhat less hastily. I wish that, possessing, as he states to your lordships, those fine feelings himself, he had supposed it possible that there might be other men of honour, other men of feeling, other men who would feel that their lives were rendered miserable by being told that they were dark and cowardly assassins,—by being told that they had uncloaked the stiletto, and plunged it into the breast of an officer. I wish that Colonel Draper, feeling so acutely the slightest imputation on his own character, feeling that he ought never to be removed from that pinnacle on which he had placed himself, had considered how deeply a man must suffer under the grievous imputation which he by this libel has cast on Mr. Sullivan." Colonel Draper was sentenced to be imprisoned three months, and to pay a fine of £100.

We return from considering the professional character, merits, and estimation of Sir Vicary Gibbs, to proceed with his personal history.—After filling the office of Attorney-General for five years, he felt himself scorched by the duties of his trust, or rather by his mode of performing those duties, and began to pant for retirement. His health, never vigorous, had been shaken, not only by his rigid discharge of his official labours, but the hourly calls on his time in the course of a very extensive practice. His high spirit was goaded to the



quick by the incessant attacks which an irritated and vindictive press launched against him, for they had received and gave no mercy. He had now attained that age at which, by an act of American legislature, a lawyer is held to be superannuated—too old and infirm for the office of a judge. He was sixty-one, and though impaired in vigour, well enough, and sufficiently able in body and mind, to do his country good service, and rather early than late according to many of our past precedents for promotion to the bench. Accordingly, in the beginning of Trinity Term 1812, he was made a puisne judge of the Court of Common Pleas, in the place of Mr. Justice Lawrence, and for six years, by an admirable discharge of his judicial functions, evinced the advantage of our national usage over the law on ~~the other side~~ of the Atlantic. It was made matter of observation at the time, that Sir Vicary Gibbs, after serving the Crown as its legal officer with such energy and zeal for so long a period, should have consented to such an implied loss of rank as a puisné judgeship, and to a certain diminution of income. The situation of Attorney-General at that epoch, (it has been rendered since of considerably less value,) realized an average income of £10,000, whilst the dignity of a puisné judge was most inadequately sustained by an allowance of £2,500 a year. Sir Vicary Gibbs, however, did not sink quietly down on the side-cushions of the bench without a promise of advancement in rank whenever a vacancy should arise. Modern theoretical reformers of our constitution have proposed to withdraw from the government this power of promoting judges, on the ground that it would render them more independent of the Crown. The expediency of such a change would be, to say the least, very doubtful. Judicial subserviency is not a subject of imminent danger in an age when popular applause and public notoriety have usurped such paramount sway, and it would, as in the present instance—the cases of Lords Kenyon and Tenterden might be also mentioned—exclude from the chief seat the very men who might be best qualified to preside in it with honour. In Trinity Term 1813, Sir Vicary was made Chief Baron of the Exchequer, and after presiding one term, the fourth part of a year, over that vacant Court, and realizing in his own person the truth of the witticism, that barons of the Exchequer are like partridges in November, no sooner down than up

again, he resigned that seat, and was finally removed to the place he had long coveted, the Chief Justiceship of the Common Pleas, in the room of Sir James Mansfield. None of his enemies, and he had many, could deny that he was entitled by desert to these successive promotions. Even had barristers the power of electing the judges, according to the whimsical notion of some modern ultra-reformers, we have such reliance on their judgment as to believe that his election would have been secure. The "Note Book of a Retired Barrister" admits that none were more highly qualified, but detracts from his eulogy by anecdotes, the accuracy of which, in delineating the judicial demeanour of Sir Vicary Gibbs, we more than question. "Until the appointment of chief justice took place" (we cite his words) "the members of the King's Bench bar knew little of him as a judge, but there was but one opinion as to his fitness for the situation which he had been selected to fill, and that, in point of learning and experience, no one could be found better qualified for it. It was the resumption of all the practice of his former life, and afforded a field for the full exercise of his legal knowledge. His decisions on the bench or at Nisi Prius furnished equal proofs of the extent of his reading and of the accuracy of his mind. His appointment to the Common Pleas, however, was not hailed with much satisfaction by the serjeants who then composed the court. To the manners of Sir Vicary Gibbs they were no strangers, and anticipated that whatever learning he might contribute to the court, he would add nothing to its comforts. Report spoke of him as carrying an unaltered temper and unchanged manner into his higher situation, and conferring their blessings on his newly adopted brothers. Endless peevishness of observation, and petulance which knew no fatigue, formed the ordinary accompaniments of his administration of justice. Whatever professional rank the coif procured, it afforded no protection against the virulence of the chief justice's remarks; and the situation of a serjeant was far from being an enviable one. Every member of the profession who had occasion to come before him, felt and complained of the offensive peevishness of his temper; and I recollect an observation of one who was then a king's serjeant, and has since filled a judicial situation, 'I wish Sir Vicary would knock me down at once, and not keep continually pinching me.'" A friend of the late Ser-

jeant Runnington, who had never before been in the Court of Common Pleas, having one day accompanied him into it, and hearing the judges and serjeants addressing each other by the affectionate title of "brother," observed that it was the first example he had found of Shakspeare's line,—

"We few—we happy few—we band of brothers."

"We give that a different version here," said Runnington; "it is, 'We, few happy, band of brothers.'" "Whom do you mean, serjeant, by the few happy?" "They who have no business," replied the serjeant, "for they do not come into contact with Gibbs."

In justice to the memory of an excellent judge, we are bound to state that this dramatic description is greatly overcharged. The writer draws his sketch from a recollection of the manners of the advocate, and not from his experience of the judge; for in the Court of Common Pleas in term time he was not allowed to practise, and he attaches more importance than they deserve to the passing jests of the day as portraiture of character. The general voice of the profession ascribes to Sir Vicary Gibbs the merit of having subdued his manner, and smoothed down asperities of temper, when clothed with the responsibility of presiding judge, a merit of which he should not be defrauded, for he accomplished this arduous task under the irritations of declining health and a debilitated frame. It was only on occasions of fraud or breach of decorum that his moral sense flashed forth its indignant disapproval. He then rolled with equal spirit, but less power, the 'non imitabile fulmen' of Lord Ellenborough, and the thunders of the Court of King's Bench were reverberated with a shrill and mimic echo from the Court of Common Pleas. In this tone and temper he refused to try an action, *Ditchburn v. Goldsmith*, between inhabitants of Gravesend, on a wager that Johanna Southcote would be delivered of a male child on or before a certain day mentioned. "So! I am to try the extent of a woman's chastity and delicacy in an action on a wager. This is a grave court of justice. Call the next cause!" In another case, *Holme, Clerk, v. Smith, D. D.* the curate had brought his action against the rector for non-residence under the 53 Geo. III. c. 49, which provides, that if the rector do not reside on his rectory, he shall keep a licensed curate to perform the duties of the church. The facts in proof

were, that the plaintiff himself had actually done the duties as curate, and had been nominated as such to the bishop, but informally. Before summing up, the chief justice addressed the plaintiff, who was seated at the table beside his counsel, in his most acrid manner, and desired him to stand up :—" I am compelled by law to sum up the evidence to the jury in your favour. The statute is imperative, and the jury are bound by law to find their verdict for you ; but, sir, you will quit this Court disgraced as a man and a gentleman. Your action is one that becomes a pettifogger, but is most unbecoming a clergyman and a Christian."

Taunton's Reports will bear a lasting record of the depth, accuracy, and extent of the legal knowledge of Sir Vicary Gibbs. One case, *Deane v. Clayton, Bart.*, with regard to which the Court differed in opinion, not only shows his discrimination, but the comity and personal deference of his manner to his brothers on the bench. The custom which prevailed when Sir Orlando Bridgman was appointed Chief Justice of the Common Pleas, of the eldest serjeant putting a case, and the newly made chief giving an answer to it extempore, had long since grown obsolete. There is no chief within our memory who could less have feared the revival of the custom than Gibbs, for to none were the names of cases, and the very pages of the reports in which those cases appeared, more familiarly known. He would sometimes, in giving judgment, suggest a case in point which had wholly escaped the notice of counsel, and often interposed in the course of their arguments with pertinent questions, not put unseasonably, or in a manner that would distract the attention, but with an appositeness that tended to save time by bringing the discussion to a point. This practice has been generally adopted by modern judges. They would confer a boon on the profession were they to comply with a suggestion that Sir Vicary Gibbs repeatedly threw out, that each court should recognise one set, and only one set, of reporters. The evil was great in his day, but had not yet risen to the magnitude of three or four reporters in one court ! As a criminal judge he administered justice in mercy. When Attorney-General, he had adhered conscientiously to his motto "*leges juraque*;" but his adherence may be thought to have trenched on the *ultima lex* and the *summum jus*—the law in its

entirety—the rigour of the law. In punishing offenders, no objections have been urged against his moderation and clemency; he soon perceived the difference between praying for and pronouncing judgment, and seems to have assumed a placable spirit with the red robes. He continued during four years and a half to preside over the Court of Common Pleas. “*Subeunt morbi tristisque senectus.*” Old age, like an armed man, was upon him. His friends and co-adjutors were retreating or dropping off one after another in rapid succession from the judgment seat. Heath had died suddenly in the act of writing a dinner note to him, and Lord Ellenborough had informed him that he should be compelled to resign. Sir Vicary determined not to lag superfluous on the stage, when his friend had quitted it. On the 4th of November 1818, Mr. Justice Abbott was sworn in Chief Justice of the King’s Bench in the room of Lord Ellenborough, and on the following day Sir Vicary Gibbs resigned his seat to Sir Robert Dallas. They had struggled through the long vacation in the hope that the breathing-time which it afforded would bring with it renewed strength for the labours of Michaelmas term,—but term came, and the hope proved delusive. Both survived their withdrawal from office a very short period: the first died in a month—Sir Vicary lived on, but his life was one long disease for upwards of a year. He retired to his pretty villa at Hayes in Kent, and there loved to babble not of green fields, but of suits of law, that law to which he had devoted his health and strength, and which had his love strong in death. His mind remained perfect amid the gradual extinction of his physical powers. The weary pulse of life at last stood still. He died February 8th, 1820, aged 69, and was buried in the family vault at Hayes.

It is stated in a short notice of him published after his decease, that his death was hastened by grief. “Circumstances connected with his private life, we read, had cruelly thwarted his better nature; and, already subjected to much physical fatigue, he had scarcely ascended the bench when a deplorable event which occurred in a distant land to one near in blood, as dear to his affections, confirmed a shock upon his system which his weakened powers might not resist, and he died, it is believed, of a broken heart.”<sup>1</sup> Without invading the sanctity of private

<sup>1</sup> New Monthly Magazine, Vol. 23.

life, we have no hesitation to express our total disbelief in this imaginary notion. We do not agree with Abernethy that the only person who ever died of a broken heart was a ticket porter; the wounds of the spirit, though they have no nomenclature in physic, slay many; but the death of a lawyer at sixty-nine is surely not so premature as to be ascribed, with any show of reason, to an affliction, however severe, which occurred several years before.

By his marriage with Lady Gibbs, who survived him, and for whom he had great affection—there are few characters more thoroughly domestic than your hard-working lawyers—he left one daughter, married to Mr. Pilkinton, and two nephews. His personalty was sworn to be under 80,000*l.* Of this sum he bequeathed 30,000*l.* to his daughter on the death of Lady Gibbs, leaving to her nearly the whole of his remaining personalty and real estate. In person Sir Vicary was below the middle stature, not more than five feet three or four inches in height, of a meagre and attenuated frame. As Miss Seward says of Dr. Darwin, “beauty and symmetry had not been propitious to his exterior.” He looked plain in his wig, and ugly out of it. It was said of him, with more truth than politeness, that his face had such strong points and angles, it might have been hewn out with a hatchet. His complexion was the colour of the parchment he had studied. A keen eye, hooked nose, thin lips, and pinched nostrils, lent an expression of peculiar acrimony to his countenance. The “*naso suspendis adunco*” of Horace represented exactly the character of that prominent feature. No one could look at him without at once perceiving that he was sarcastic and austere. His address did not redeem the outward appearance of the man, being at once constrained, distant, and assuming.

On his character, after the illustrative anecdotes and comments we have given, it would be superfluous to enter into further observations in detail. One caution is indeed necessary to guard the reader against a too unfavourable impression. He was a man of worth, but unamiable—a high churchman in religion, and in his politics a decided Tory. His eloquent advocacy of the acquitted felons in 1794 had made the name of Gibbs for a season, though he never appeared amongst them, a favourite with their party, and when he became an

official supporter of government, their displeasure evaporated in the harmless joke of proposing the *memory* of the *late* Mr. Gibbs. His bias to Toryism became more determined as he advanced in years, but he had no opinions to recant—no mean adoption of convenient politics to justify—no apostasy to explain. We have admitted his ill-temper, and assigned indifferent health as an excuse, the force of which will be admitted by those alone who have themselves struggled with disease. They know how futile is the ironical bidding of the poet :

“ Go bid physicians preach our veins to temper,  
And with an argument new set a pulse.”

To the zealous patronage of Gibbs, Gifford and Dampier were chiefly indebted for promotion. His anxiety, indeed, in aiding the professional advancement of young friends exposed him, with too much reason, both in his official character of Attorney-General and in the capacity of Judge, to the imputation of favouritism. The bar of the Western Circuit had cause to complain of the spirit of partizanship with which he sought to push the fortunes of an especial favourite. It is a fault which all men in authority and leaders of circuits ought carefully to shun, both on personal and professional grounds ; for it tends to exclude that fair and equal chance of success which is the best characteristic of the law as a profession, and necessarily exposes those against whom it is charged to much censorious remark. But it is a fault to which men of cold and reserved habits, who attach to themselves few intimacies, and who feel, in consequence, more than due gratitude for the show of friendship in the patronized, are peculiarly prone to commit.<sup>1</sup> This was the head and front of Sir Vicary Gibbs' offending. A high sense of honour—the innate feelings of a gentleman—a compliance, the most rigid, with the Decalogue—the domestic virtues—all these he had, but he wanted the grace, which is to the character what the frieze is to the column. His best friends must wish that he had studied more the amenities that adorn and the charities that soften life. He was beloved in the family circle—faithful to his friends—devout, magnanimous, and just ; but he failed in manner, and his un-

<sup>1</sup> In most modern instances there is another and a meaner motive. The patron remunerates himself by the labour of the patronized.—*Edit.*

gracious deportment cast a shadow over the worth enshrined within. His great leader Erskine was almost worshipped in his generation, for apart from his gift of eloquence, he had a ready smile, a prompt and warm shaking of the hand, a pun, a jest, a repartee for all his friends; the idol of the robing-room, the demigod of the circuit table. Such is the importance of a facile address—a happy manner—a courteous bearing in our intercourse with the world. In real, intrinsic goodness of heart, Sir Vicary Gibbs need not have shunned the comparison. Peace to his manes! Though he failed to conciliate the good will of his cotemporaries, we may venture to predict that his name will be held in honour by posterity, for the merits of the lawyer have survived the humours of the man.

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ART. IV.—MERCANTILE LAW, NO. XIV.—MERCHANT SHIPPING.

(Continued.)

At the close of our last discourse we had arrived at the third branch of the inquiry into the incidents of contracts relating to the repair and supply of vessels, the nature, namely, of the charge thereby created, whether personal or specific, or both.

By the civil law debts so arising were among the number of those which were *privileged*, that is to say, in respect of which the creditor had a hold upon the subject itself, in priority to such general claims upon the owner as had no immediate reference to the particular property.<sup>1</sup> A like rule consequently still obtains in most of the maritime states of Europe. But the common law of England, not recognizing any such distinction, leaves the debts contracted for the service of the ship to take their place among the ordinary obligations arising out of simple contracts—imposing a personal liability only, unless the property be retained by the creditor under a claim of lien, or be specifically pledged by the formal act of the debtor. Frequent attempts indeed have been made, by proceedings in the Court of Admiralty and elsewhere, to

<sup>1</sup> See vol. xii. p. 109, note (4), in which the order of privileged debts according to the law of France is set out.



import the privilege against the ship into the law and practice of this country;<sup>1</sup> and extreme cases might be found,<sup>2</sup> and dicta of eminent judges, inadvertently let fall and hastily gathered up, might be cited,<sup>3</sup> which have seemed at times to sanction such attempts: but the contrary doctrine is at the present day too well settled to render a detailed examination of the authorities either profitable or interesting.<sup>4</sup> It remains therefore only to notice the two exceptions of lien and hypothecation.

First. As to the lien.—By the law of England every workman or artificer has an undoubted right to retain in his hands the subject upon which his labour and skill have been bestowed until payment or tender of the stipulated remuneration. A ship-wright therefore, having the entire possession of the vessel in his own yard or dock, may detain it till the debt for the repairs then executed is satisfied.<sup>5</sup> But lien being a right to retain the subject upon which work has been done as a security for the payment of the price of such work, it follows from this definition,—1st, that the privilege does not extend to tradesmen supplying a ship with stores and provisions,—2dly, that it does not attach at all where there is no power to retain, that is to say, where actual and exclusive possession has not been taken, and—3dly, that it is irrevocably lost when the possession has been once voluntarily parted with.<sup>6</sup> It is equally clear that the privilege is superseded by a special agreement or custom of trade inconsistent therewith; and therefore it is that upon the River Thames, where by established usage a credit is given by the ship-wrights, no lien attaches upon a vessel for repairs.<sup>7</sup>

<sup>1</sup> See *Hoare v. Clement*, 2 Shower, 338; *Justin v. Ballam*, Salk. 34; 2 Lord Raym. 805.

<sup>2</sup> See a case of this kind, 3 Rob. Adm. Rep. 288; but this, as has been rightly observed, was an *ex parte* proceeding, and the circumstances were peculiar.

<sup>3</sup> See *Rich v. Coe*, Cowp. 636; *Farmer v. Davis*, 1 T. R. 109, both by Lord Mansfield, and a similar inaccuracy, or rather perhaps too great generality of expression, by Littledale, J. in *Reeve v. Davis*, 1 Ad. & E. 312.

<sup>4</sup> It is sufficient to refer to *Watkinson v. Bernardiston*, 2 P. Wm. 367; *Buxton v. Snee*, 1 Ves. 154; *Hussey v. Christie*, 13 Ves. 594; 9 East, 426.

<sup>5</sup> *Ex parte Bland*, 2 Rose, 91; *Franklin v. Hosier*, 4 B. & A. 341.

<sup>6</sup> *Ex parte Bland*, *supra*.

<sup>7</sup> *Raitt v. Mitchell*, 3 Camp. 146. It appeared on the trial of this cause that the period of credit varied according to the trade in which the vessel was employed;

Secondly, as to the hypothecation.—The right of the owner to pledge the vessel by an ordinary instrument of mortgage is but the necessary consequence of his ownership, and it seems to be equally undoubted that he may, as in former times, when capital was less abundant, he not unfrequently did, hypothecate it for the expenses of outfit by a contract peculiar to this species of property and known by the name of bottomry.<sup>1</sup>

The contract of bottomry is an engagement whereby the borrower, or debtor, binds not only his own person but the vessel and its accessories to the payment of a specified sum, being the aggregate of the original debt and a stipulated sum added by way of premium or interest, within a certain period after the arrival of the vessel, in case it should so arrive, in the port of destination; and the term is derived from the technical use of the word “bottom” as signifying the keel, and therefore figuratively the whole body of the ship. The practice of taking up money on the specific security of the vessel at a high rate of interest, proportioned to the risk of the voyage, is of very ancient origin, and forms the subject of a particular chapter in the Digest;<sup>2</sup> but as the engagement, thus generally viewed, belongs rather to the class of contracts hereafter to be examined under the head of insurance, the repayment being made to depend on

that the usual credit was fifteen months, and that for East India ships it was no less than eighteen months. It seemed indeed to be calculated according to the time at which a profitable return might be looked for by the owner.

<sup>1</sup> Abbot on Sh. p. 117. That the owner may also hypothecate by bottomry in the course of a voyage for the necessities of the voyage has been decided in the Court of Admiralty, in the case of the Duke of Bedford, *Morris*, 2 Hag. Adm. Rep. 294, the learned judge (Sir Christopher Robinson) citing as authorities, Pothier, vol. iii. p. 97; Emerigon, vol. ii. p. 378; Valin, liv. iii. tit. 5, art. 8; and Bynkershoek, vol. vi. p. 515.

<sup>2</sup> *De nautico fœnore*, Dig. 22, 2; & Codex, 4, 83. But the Roman law says nothing of hypothecation by the master for the necessities of the voyage, which practice seems to have sprung up in later times. “This contract of bottomry,” says Lord Stowell, speaking with reference to the act of the master, “is comparatively of later growth, and arose out of the necessities of an enlarged commerce,” and he cites the following passage from Bynkershoek. “*Origo hujus contractûs ex jure romano, sed quæ ibi legimus vix trientem absolunt totius argumenti. Adeo tenuia etiam apud nos fuerunt ejus contractûs initia: ut non nisi mutuum significaverit quo magistro peregre agenti permissum est navem ex causa necessitatis obligare.*” 3 Rob. Adm. Rep. 267.

the contingency of the ship's arrival, our attention may for the present be confined to the effect and validity of a contract of bottomry, when entered into by the master for the purposes of the vessel; for that the master has, under certain circumstances, the power of hypothecating the ship, has been already stated.

The instrument by which the hypothecation is made is commonly either a bond or a bill of sale;<sup>1</sup> but no particular form is prescribed as essential to the validity,<sup>2</sup> and provided that the nature and substance of the transaction sufficiently appear, the instrument in which it is embodied "is always (to use the language of Lord Stowell) upheld by the maritime court with a very high hand." The matters usually and properly expressed are—the circumstances which gave occasion to the loan—the sum lent—the rate of interest or premium agreed, the name and description of the ship—the voyage to be performed—the personal obligation of the borrower—the assignment of the vessel and freight—and the contingency on which the repayment depends. This last particular, indeed, seems to be indispensable, because unless it be expressly stated, or can be fairly gathered from the instrument, that the lender was to take the sea risks of the voyage, not only is the essence of bottomry wanting,<sup>3</sup> but if the maritime interest be charged

<sup>1</sup> See the forms given in the Appendix to Ab. on Sh. pp. 487, 488.

<sup>2</sup> Considering the circumstances under which they are commonly drawn up, it would amount to a general nullification, if strict technicality of expression were required. In equity it seems that a mere agreement in a foreign port to give a bond of hypothecation will be sufficient to bind the vessel. *Ex parte Halkett*, 2 Rose, 194, per Lord Eldon.

<sup>3</sup> "The hypothecation, or bottomry bond," says Lord Stowell, "known to the civil law, and acted upon with an undoubted authority by this court, is a bond whereby the captain of a vessel, not having any credit in the port, is enabled to obtain money for the repairs of the ship, and its equipment for the voyage, upon what is called maritime interest. In the Roman law, in which it was familiarly known, it was called *usura maritima*, or *fœnus nauticum*. The extent or value of this security for repayment was not limited, for it was not certain, but only eventual, dependant upon the safe accomplishment of the intended voyage. If the ship arrived safe, the title to repayment became vested; but if the ship perished in *itinere*, the loss fell entirely upon the lender. Upon that account the lender was entitled to demand a much higher interest than the current interest of money in ordinary transactions. It partook of the nature of a wager, and therefore was not limited to the ordinary interest; the danger lay not upon the borrower, as in ordinary cases, but upon the lender, who was therefore entitled to charge his *pretium*

the contract itself is usurious and void, not only as a charge upon the ship, but as a personal obligation on the borrower.<sup>1</sup>

Not unfrequently the master by whom the bond is given affects by the terms of it to bind the owner as well as himself.<sup>2</sup> This, according to the law of England, is an excess of his authority, and therefore inoperative. But the informality does not altogether vitiate the bond, which, as has been many times decided, though bad in part, may yet stand good for the rest.<sup>3</sup>

Technically, by the common law, a bottomry bond being a *chose in action* cannot be assigned, but in practice such instruments are constantly transferred, and put in suit by the assignee. As against the *person* of the borrower they may be enforced by the courts of common law, by an action in the

*periculi*, his valuation of the danger to which he was exposed." 2 Hag. Adm. Rep. 57. In the case which give rise to these observations, the instrument, though called a bottomry bond, contained an express clause that the sum secured should be paid within thirty days after the safe arrival of the ship, or in case of the loss of the ship then within thirty days after intelligence of the loss, and Lord Stowell doubted his jurisdiction to entertain the suit at all, on the ground that it was not that species of maritime contract which belonged to the cognizance of his court. In the case of *Simonds v. Hodgson* the master bound himself, the ship, her freight and cargo to the payment in eight days after his arrival in London, and expressly declared that he made liable the vessel &c. "whether she do or do not arrive at the above-mentioned port of London." The Court of Common Pleas held this to be no bottomry bond, as excluding the sea risk, but this decision was reversed on error in the King's Bench, upon a liberal and probably correct construction of the language of the instrument. 6 Bingh. 114, 3 B. & Ad. 50. That the marine risk is of the essence of these bonds, see the authorities cited in the case of the *Atlas*, Clark, 2 Hag. Adm. Rep.

<sup>1</sup> So decided by the Court of Delegates in the case above cited, 2 Hag.

<sup>2</sup> An instance of this kind occurs in the first precedent given in *Abbot on Shipping*.

<sup>3</sup> "One objection is, that it binds the owners personally as well as the ship and freight, which it cannot do. That is held in this court to be no objection to the efficacy of what it is admitted it can do. Here we do not take this bond *in toto*, as is done in other systems of law, and reject it as unsound in the whole, if vicious in any part. But we separate the parts, reject the vicious and respect the efficiency of those which are entitled to operate. The form of these bonds is different in different countries; so is their authority. In some countries they bind the owner or owners, in others not: and where they do not, though the form of the bond affects to bind the owners, that part is insignificant, but does not at all touch upon the efficiency of those parts which have an acknowledged operation." Per Lord Stowell, in the case of the *Nelson*, 1 Hag. Adm. Rep. 176. See also 3 Rob. Adm. Rep. 271; 1 Dodson, Adm. Rep. 288; 2 Dods. 146; and 1 Hag. 13.

name of the original obligee; but the jurisdiction *in rem*, which transcends the powers of the ordinary tribunals, is exercised—at all events when the hypothecation has been made *abroad*<sup>1</sup>—by the Court of Admiralty, which issues its warrant to arrest the ship, and, if necessary, decrees a sale for the satisfaction of the bond and other charges, if any, according to the order of priority.<sup>2</sup>

Under ordinary circumstances the contract of the parties expressed in the bond is taken as conclusive upon the terms, but the Court of Admiralty, governing itself in this respect by the principles and practice of the courts of equity, asserts a right (though with a cautious and sparing exercise), whilst sustaining the bond generally, to reduce the stipulated premium, when apparently fraudulent or extortionate.<sup>3</sup>

Indeed, when we consider the magnitude of the sums occasionally borrowed, and the high rate of interest, amounting sometimes to twenty-five or even thirty per cent., payable on advances thus procured, we cannot but acknowledge that in this power of hypothecation the master is entrusted with a large and perilous discretion. Fortunately for this country, British capital and British credit are now so widely diffused through the great community of trading nations, that hypothecation bonds are in less frequent use with us than among other maritime states. But in the uncertainties of navigation emergencies will occur in which such a power is not only beneficial but necessary: and when we reflect on the difficulty of obtaining supplies in remote places where money may be scarce on the personal credit of parties unknown—on the danger to life and property which might result from the want of needful repairs—nay, that often the only alternative would be the absolute abandonment of the vessel—the expediency of main-

<sup>1</sup> For it is apprehended that no matter arising *within the realm of England* can belong to the cognizance of the Admiralty Court, even though without the aid of that court there might be no means of specifically enforcing the contract. See the observations of Lord Stowell in the *Atlas*, 2 Hag. 62. “The civil law courts,” he says, “have no right to usurp an authority merely because a common law court does not possess it: it must have a more direct and positive foundation. A court of civil law does not claim to be the refuge for all destitute jurisdictions.”

<sup>2</sup> The question is sometimes raised by consent by a proceeding called an act on petition, in which both parties state their case for the opinion of the court.

<sup>3</sup> The *Cognac*, 2 Hag. 377. Wages of the seamen have the priority.

taining the validity of such acts, when fairly warranted by the exigencies of the case, is at once apparent. The maritime court of this country, attentive as well to the necessity of the power as to the danger of abuse, has framed its rules accordingly. "It is unnecessary," observes Lord Stowell, in one of those admirable judgments which have immortalized his name, "to say that bonds of this description when entered into fairly and *bonâ fide* are very favourably regarded in this court. They are given as a security for money advanced for the necessary use of a ship in a foreign port, where the owners and master have no personal credit, and where without such assistance the ship must continue to lie until it becomes rotten and useless. It is highly expedient therefore that they should be upheld with a vigorous hand. The principle on which they are founded and supported is of great antiquity and deeply radicated in the general maritime law, from which it has been transferred into the law of this country. Where the master cannot procure the necessary supplies on the personal credit of himself or his employers, there can be no doubt that he is at liberty to pledge the ship itself by way of security to the lender, and to stipulate for the payment of interest after a rate which, in cases of bonds granted under other circumstances, would be deemed usurious."<sup>1</sup>

In the passage here cited is contained a summary of the requisites of a valid act of hypothecation. For, first, the security must be *bonâ fide* given for a debt to which the owners would be fairly liable. If the master should attempt to pledge the vessel for his own benefit, or even for a debt necessary for the vessel, but rendered necessary by his own previous misconduct, such an attempt would be a fraud upon the owners, which would invalidate the instrument in the hands of a party cognizant of the facts.<sup>2</sup> Still, if the money were really advanced on a *justifiable* occasion for the service of the ship, a subsequent misapplication by the master would not affect the security.<sup>3</sup>

<sup>1</sup> The Hero, 2 Dods. 130.

<sup>2</sup> Ab. on Sh. 127. The case there cited from Loccenius is a good illustration of the principle.

<sup>3</sup> Ibid. and 3 Rob. 272.

Secondly. It must be for the necessary purposes of the vessel. The presumption would be that it was so, for the law never surmises fraud; but the owners may impeach the bond by showing affirmatively, if they can, that the supplies for which the money was borrowed were manifestly unnecessary or excessive.<sup>1</sup>

Thirdly. The hypothecation itself must be necessary; or, to speak more precisely, if it appear that the money or supplies might have been obtained without resort to this extreme expedient, the bond will not be enforced as a charge upon the ship. It must be made, therefore: 1. *In the course of a voyage*; because if the vessel were not upon a voyage, it may be fairly concluded that the urgency was not such as to warrant the exercise of the power, the very purpose and object indeed of conferring it being that the person in command may thereby be enabled successfully to complete the adventure which he is prosecuting for the presumable benefit of the owner. 2. It must be made *in a foreign port*; or, at all events, in such a place, and under such circumstances, as to render communication with the owners, if not impossible, both difficult and inexpedient: or the proposition may be stated thus: in a foreign port the presumption of law is in favour of the hypothecation—in a domestic port it is strongly against it, and must be met by cogent and irresistible proof of the necessity and good faith of the act.<sup>2</sup> 3. It must be resorted to only on failure and exhaustion of all means for obtaining the requisite aid on the personal credit of the master and owners. For example: in practice it sometimes happens

<sup>1</sup> Holt on Sh. 240, and the cases on bottomry bonds generally.

<sup>2</sup> It has been already said that in the actual port of residence of the owners the power of the master to raise money by loan is altogether superseded; *à fortiori*, therefore, a bottomry bond given at such place would be invalid. What is to be deemed a home port, and what a foreign port, has been a question among foreign jurists; but according to our law the correct criterion will be found, it is apprehended, in the text. One can scarcely conceive a case in which a bottomry bond given in an English port could bind owners resident in England; but Ireland and Jersey have been deemed to be foreign, so as to sustain such bonds and the jurisdiction of the Admiralty Court; and Lord Stowell upheld a bottomry bond given at Corunna by the master of a Spanish vessel, bound from Alicant to London. "The validity or invalidity of the bond," he says, "does not rest on the mere locality of the transaction, but upon the extreme difficulty of communication between the master and his owners." See also the *Rhadamanthe*, 1 Dods. 201.

that the lender takes from the master bills of exchange upon the owners. Now if the advances *were originally made on the credit of the bills so given*, it would in that case be clear that the additional security of bottomry was unnecessary, and a bond executed under such circumstances would be invalid as an instrument of hypothecation.<sup>1</sup> But bills of exchange may be given *as a further and collateral security* without prejudice to a contract of bottomry expressly stipulated for by the lender.<sup>2</sup> Again, if the owner have an accredited agent at the port where the transaction took place, a strong inference arises that the funds or credit might have been obtained without an hypothecation: nevertheless, if it appear that the agent was without funds, and that there were in fact no other means of supplying the exigencies of the vessel, the transaction will stand good; nay, a bond of hypothecation given to the agent himself is not necessarily invalid, though tainted of course with much suspicion, and demanding the strongest evidence of fairness.<sup>3</sup>

<sup>1</sup> The Augusta, Dods. 283.

<sup>2</sup> Samson v. Bragington, 1 Ves. 443. The general principle, that such bonds may be given only in default of personal credit, is to be found stated or admitted in all the cases. See the Hero, *post*, note.

<sup>3</sup> The Hero, 2 Dods. 139. "It is said that the bond is not good because it is granted to the agent of the owner, who is bound to supply the necessary funds for the disbursements of the ship, without looking to a bottomry bond to secure the repayment of the money. It has been argued, and with apparent propriety, that a person to whom the ship is consigned by the owner, and who must be in constant correspondence with him, ought to make the necessary advances, without demanding maritime interest; and it has been truly said, that a party is not at liberty to act as the agent of the owner, and at the same time to take upon himself the character and privileges of a stranger; to act as if there was a necessity, when no necessity exists. The case of necessity, which is the foundation of a bottomry bond, does not arise where there is a credit existing, on which money can be obtained without resorting to the real security of the ship. At the same time I will not take upon myself to lay it down as a universal proposition, that an agent may not, under any circumstances, take the security of a bottomry bond. Cases may possibly arise, in which an agent may be justified in so doing. It can be no part of his duty to advance money without a fair expectation of being reimbursed, and if he finds it unsafe to extend credit to his employers beyond certain reasonable limits, he may then surely be at liberty to hold hard, and to say, 'I give up the character of agent,' and, as any other merchant might, to lend his money upon bond, to secure its payment with maritime interest. If in such a case he gives fair notice that he will not make any further advances as agent, and affords the master an opportunity of trying to get money elsewhere, and the master is unable to do so, but is obliged to come back to him for a supply, then he is fairly at liberty, like



As a ship in the prosecution of her voyage is liable to more disasters than one, it follows that more than one bond of hypothecation also may have been properly and necessarily given by the master; in which case, contrary to the rule which obtains as to ordinary deeds, the security of latest date has the priority of charge—on the equitable principle, that but for the aid afforded by means of the last the whole benefit of the former securities would have been lost: *salvam fecit totius pignoris causam*.<sup>1</sup>

With the ship the master may, and usually does, hypothecate the accruing freight.<sup>2</sup> In one instance, the Court of Admiralty decreed the freight of a *subsequent* voyage to be subject to the charge; but as the occasion was peculiar, and the Court “desired not to be understood as laying down any general rule applicable to all circumstances and all cases where any third party might have become interested in the freight of the subsequent voyage,” it will be safer to consider the charge as operating upon the freight of the *existing* voyage only.<sup>3</sup>

Nor is the power of hypothecation confined to the vessel and her earnings alone; for it was decided, on mature and well-grounded consideration, by Lord Stowell, that necessity may justify the master in including the whole cargo in the pledge, and that the hypothecation will be available against the shippers after exhaustion of the ship and freight.<sup>4</sup> The main arguments on which this celebrated judgment proceeded were—that the master is not the servant of the ship-owner merely, but is also in some sense, from the necessity of his position,

any other merchant, to advance the money on a security that is more satisfactory to himself. I will not say that the case might not go further. If the agent had given credit for all the disbursements of the ship, and found, contrary to his expectations, that they amounted to more than he calculated, and went beyond any advances which he might reasonably be called upon to make on the mere personal credit of his employers, and if there was no time to look to other quarters for assistance, he might possibly be justified in resorting to this species of security, giving the earliest notice of the necessity under which he acted.” Per Lord Stowell, *ubi sup*. See also the *Rhadamanthe*, 1 Dods. 201.

<sup>1</sup> 1 Dods. 204. 278; 2 Dods. 2; Bynkershoek, *Quest. Jur. Pub. lib. i. c. 19*.

<sup>2</sup> *Ab. on Sh.* 125.

<sup>3</sup> *The Jacob*, 4 Rob. 245.

<sup>4</sup> *The Gratitude*, 3 Rob. 240. The student who may peruse this admirable judgment will be grateful for the reference.

the supercargo and agent of the shipper—that his undisputed powers in cases of *jactus* and ransom were at least equally extensive with that under consideration—that it was not less indisputable, and the books overflowed with authorities, that in case of emergency he might *sell a part* of the cargo for the preservation of the rest, and that the *hypothecation of the whole*, the probable and ordinary effect of which would be the sacrifice of a part by a sale *at the market for which the goods were destined*, was an act closely analogous in principle, and more beneficial in practice.

It must however be borne in mind that, though under circumstances of *great and extreme pressure*,<sup>1</sup> the master is permitted to hypothecate the whole or sell a part of the cargo for the necessary repairs of the vessel,<sup>2</sup> he has no right in any case to sell the *whole* for such a purpose, because, as has been well observed, it never can be for the benefit of the cargo that the whole should be sold to repair a vessel which is to proceed *empty* to the place of destination.<sup>3</sup>

We have now completed the inquiry into the incidents and effect of contracts for repairs or supplies: we have seen upon what parties the liability falls—in respect of what matters they are liable—and under what circumstances the vessel itself and the goods on board are specifically chargeable with the debt. But before we return to the order of our course, we are led by this subject of hypothecation to another with which in principle it is intimately connected, and of which therefore, though summarily noticed before under another aspect,<sup>4</sup> it has been thought advisable to refer the more detailed consideration to this place—we mean the sale of the vessel, under circumstances of distress, by the act or authority of the master.

It has been already, in substance, stated that the inference from the many and not very reconcileable authorities seems to be this: that although the power of selling the ship under his command *may* reside in the master as a portion of that ample confidence which, of necessity, is bestowed upon him;

<sup>1</sup> Campbell v. Thompson, 1 Stark. N. P. C. 490.

<sup>2</sup> The power of the master to sell the cargo in case of *wreck* for the benefit of those concerned will be considered hereafter.

<sup>3</sup> By Lord Stowell in the *Gratitudine*, ubi sup.

<sup>4</sup> Viz. as regards the title to a purchaser.—vol. xiii. p. 104 et seq.

yet the exercise of the power can be justified only by an occasion of the last emergency, and when no alternative remains but the abandonment and utter sacrifice of the property. In the earliest reported cases on this subject we find the existence of any such power under any circumstances peremptorily denied—and that by judges of no less weight and eminence than Sir Matthew Hale and Lord Holt:<sup>1</sup> and it must be admitted that this conclusion is in strict accordance with the general maritime law, and is a legitimate deduction from the principle, that the master is the servant and mandatary of the owner for a special purpose with which the absolute sale of the property committed to his charge is altogether inconsistent. Nevertheless, in modern times the rigour of this doctrine has been somewhat relaxed, though slightly and by way of exception only, as will be apparent from the following authorities. In a case<sup>2</sup> involving this question which came before Lord Ellenborough at nisi prius, that learned judge, in his direction to the jury, stated his opinion to be, “that although the master had no general authority to sell, he had an implied authority, in cases of extreme necessity, to act for the benefit of the concern, exercising a sound discretion, such as the owner himself would exercise if he were upon the spot; and that in extreme cases, and extreme cases only, he had power to sell, as in the instance of a wreck which could not be got off and ought not to be left to perish absolutely.” And he desired the jury to consider whether, in the case before them, there was such a necessity as would have induced the owner himself to sell if he had been present; and if they thought there was such a necessity, then whether the sale in that instance was fraudulent. In a later case before the Court of Admiralty,<sup>3</sup> Lord Stowell expressed himself as follows:—“A sale of the vessel was made by the master without the authority of his owners: and it is contended that such a sale, being made under the pressure of necessity, will convey a valid title to the purchaser. But in the first place it must be shown that there was a necessity, and then it remains to be consi-

<sup>1</sup> *Tremenhere v. Tresillian*, 1 Sid. 452; *Johnson v. Shippen*, 2 Lord Raym. 984.

<sup>2</sup> *Hayman v. Moulton*, 5 Esp. N. P. C. 65; Ab. on Sh. 8. The report adopted in the text is from the latter work.

<sup>3</sup> *The Fanny and Elmira*, Edwards, Adm. Rep. 117.

dered whether it was such as by law would give the master a right to sell. That such a case *may* arise, I am not prepared to deny: Suppose, for instance, a ship in a foreign country, where there is no correspondent of the owners and no money to be had on hypothecation to put her in repair—Under these circumstances what is to be done? The ship may rot before the master can hear from his owners; and, therefore, if the necessity were clearly shown, with full proof that everything was done *optima fide* and for the real benefit of the owners, the Court might be disposed to sustain a purchase so made." And, shortly afterwards, as if anxious to confine within the closest limits the exception thus cautiously admitted, he adds: "In a case of that description, I say, strongly put, where there was no ground for suspicion, although I do not know that such a power is given to the master by the general maritime law, yet, feeling its expediency, *this Court would strain hard* to support the title of the purchaser. But then there must be the clearest proof of the necessity: it must be shown not only that the vessel was in want of repair, but likewise that it was impossible to procure the money for that purpose."

Some later cases, in which the question has been incidentally raised in actions upon policies of assurance, have leaned to a further extension of the power,<sup>1</sup> but as those decisions are understood not to have found a general concurrence, it may not be presumptuous to hazard an opinion, that the true doctrine is contained in the passages just cited; and that, to put the proposition into homely but significant language, the master may sell, and then only, when he can reasonably and conscientiously say within himself, "It is impossible to save the ship and bring her home: it will be better that the owners should get something, however little, than lose all."<sup>2</sup>

The vessel now being manned, victualled, and repaired, is ready for the reception and conveyance of her destined burden; but before we proceed to the important relations between the owners and other parties arising out of the employ-

<sup>1</sup> Roy. Exch. Ass. Comp. v. Idle, 8 Taunt. 755, from the doctrine laid down in which case the Court of K. B. seems to have dissented. 3 B. & B. 151 (n.); Read v. Bonham, 3 B. & B. 157; Richardson, J. dissentiente.

<sup>2</sup> See the reference to the cases, vol. xiii. p. 104, n. 7.

ment of the ship as a vehicle of goods, it will be convenient, by way of clearing the path, to advert to certain regulations interposed by the law for the protection of property subject to so great peril.

I. As the safety of all mainly depends on the efficiency, fidelity, and good conduct of the crew, every seaman entering on board a merchant ship is required, before the vessel quits the port, to execute articles of agreement,<sup>1</sup> whereby, among other things, after an undertaking on the part of each to serve on the projected voyage in a specified capacity, the crew generally "engage to conduct themselves in an orderly, faithful, honest, careful and sober manner, and to be at all times diligent in their respective duties and stations, and to be obedient to the lawful commands of the master in every thing relating to the ship, materials, stores, and cargo." Any seaman who, after signing these articles, shall desert the ship, forfeits all his clothes and effects on board, and all wages and emoluments to which he may be entitled: moreover, if the desertion take place in parts beyond the seas, any increase in the rate of wages beyond that stipulated in the agreement, which the master may be under the necessity of paying to a substitute, is recoverable by summary process from the deserter.

On the other hand, the forcing on shore or wrongful abandonment of a seaman by the master in any place beyond the seas, before the completion of the voyage for which he was engaged, is a misdemeanor punishable by fine and imprisonment, and cognizable by any criminal court within the jurisdiction of which the offender shall be found; and by way of further and more effectual protection it is peremptorily required that no seaman shall be discharged, or left behind, on the plea of desertion, disappearance, or incapacity to proceed, in any place beyond the seas, without the sanction,

<sup>1</sup> The bill alluded to in the last article as introduced by Sir James Graham is now on its passage through the House of Lords, and is intended to come into operation on the 31st July, (the day of the publication of this number of the Magazine.) It prescribes, among other things, the form of these articles, which we shall have occasion particularly to consider in treating of the hiring and the wages of seamen, a subject which it will be remembered was postponed in anticipation of the new law. In what follows we have not scrupled to follow the language of the bill, and to treat that as law, which, in all reasonable probability, will be so before these pages reach the public.

attested by a certificate, of some resident functionary, or, if none such, of two respectable merchants.

The agreement contains, as we have seen, a promise of obedience to the lawful commands of the master; and even without such an express undertaking the law confers upon him so much authority as is required for the indispensable duty of maintaining good order and discipline on board. The extent and limits of this authority are as well defined as the nature of the case seems to admit in the following passage, extracted from an elaborate judgment of Lord Stowell, upon a proceeding instituted in the Court of Admiralty by a mariner, against the captain of a ship in the East India private trade, for ill treatment on the voyage.<sup>2</sup> “ In a case of gross misbehaviour, the master of a merchant-ship has a right to inflict corporal punishment upon the delinquent mariner; that right must be supported by the law of England, which is the proper authority for fixing the limits within which one subject of this realm has a right to inflict corporal suffering upon another. Upon that ground I dismiss all reference to authorities of the foreign maritime law, and I regret that so little upon this subject is to be found in our own. No statutable regulations exist upon this subject: the only authorities are supplied by the decisions of the courts of law, acting upon considerations of necessity and just discretion; and upon such grounds I think the following rules may be considered as sufficiently established. In the first place, that the punishment must be applied with due moderation. It is asserted, in some well-considered books, that the law gives the same authority to the captain of a merchant ship to chastise his mariners for misbehaviour, as a master possesses over his apprentices; meaning, that it is inherent in him, upon the same grounds of necessity and sound discretion in the one case as in the other; not certainly to be used exactly in the way of an equal measure of punishment, because the apprentice is generally a youth of comparatively tender years, and whose acts of misbehaviour can hardly produce the same destructive consequences as may attend the negligence of the mariner—an experienced person, of confirmed strength, capable of sustaining a severer infliction than could properly be applied to a stripling, and whose acts

<sup>2</sup> The *Agincourt*, 1 Hag. 271.

even of negligence may draw after them consequences fatal to all the lives and all the property on board. It is hardly necessary to add, as a corollary, that in all cases which will admit of the delay proper for inquiry, due inquiry should precede the act of punishment, and therefore, that the party charged should have the benefit of that rule of universal justice, and of being heard in his own defence. A punishment inflicted without the allowance of such benefit, is in itself a gross violation of justice. There are cases undoubtedly, which neither require nor admit of such a deliberate procedure. Such are cases where the criminal facts expose themselves to general notoriety by the public manner in which they are committed, or where the necessity occurs of immediately opposing attempted acts of violence by a prompt reaction of lawful force, as in the disorders of a commencing mutiny: these are cases that speak for themselves, and are of unavoidable dispensation. It may be matter of prudence, but it is not matter of strict obligation, in vessels of this kind, that the captain should communicate with other officers of the vessel; nor do I find that any particular mode or instrument of punishment has received a particular recognition; that must be left to the common usage practised in such cases, and to the humane discretion of the person who has the right of commanding its application."<sup>1</sup>

It is almost superfluous to add any thing to this clear and forcible exposition, and we shall therefore content ourselves with the following summary: The master is armed with unlimited power over the persons under his command in all that relates to the government of the ship, but for the wanton abuse of that power he may be called to strict account. For the suppression or prevention of a mutiny he may, if needful, shoot a ringleader through the head; but he must not lay a finger on the meanest seaman from groundless passion or caprice. The law, in short, will uphold him in the due exercise of his authority, to whatever extent it may upon emergency be carried, but it will not suffer him to play the tyrant with impunity. He may administer chastisement, sparingly and temperately,

<sup>1</sup> The judgment then proceeds, with a masterly analysis of the cumbrous evidence in the case, to test the conduct of the master by the principles here laid down, and to mark out the deviations.

for example or correction; but corporal punishment should be resorted to only as a last expedient, when all other means have failed; and it must always be borne in mind that the jurisdiction of the captain is confined to matters immediately connected with the navigation and safety of the vessel; that as to ordinary offences committed on board, he is not to take upon himself to act as judge and to punish the offender judicially, but that his duty is simply to secure the person of the criminal and to cause him to be brought before the regular tribunals.<sup>1</sup>

In the case above referred to, compensation was awarded to the complainant, a common seaman, and a man of colour, to the extent of 100*l.*, together with the costs of suit. Nor is the remedy confined to the Court of Admiralty, for the injured mariner may, if he think fit, bring his case before a jury through the medium of a Court of Common Law.<sup>2</sup> Justices of the peace also may take cognizance and summarily dispose of common assaults committed on board merchant ships.<sup>3</sup>

The offence of setting fire to, or otherwise wilfully destroying a vessel, is a felony punishable with death.<sup>4</sup> So also is that of running away with the ship or cargo, or voluntarily yielding them up to a pirate, or endeavouring to make a revolt in the ship; each of these acts being expressly declared to be piracy, subjecting the offender to the summary punishment of a pirate.<sup>5</sup> On the other hand, bounties and privileges are awarded by law to seamen who have successfully resisted the attacks of pirates, enemies, or sea-rovers, and brought the vessel safe into her port.<sup>6</sup>

II. Of scarcely less importance to the safety of navigation are the regulations with respect to pilots. In some countries the pilot is an officer permanently attached to the vessel, hav-

<sup>1</sup> Acts of disobedience or misconduct on the part of a mariner generally subject him to the forfeiture of the whole or a portion of his wages. The lawfulness therefore of the command imposed not unfrequently comes into question in suits for wages, of which instances will be given hereafter.

<sup>2</sup> See 2 Bos. & Pul. 224; 2 Stark. N. P. C. 516.

<sup>3</sup> By the new act or rather bill, sect. 37.      <sup>4</sup> 7 & 8 Geo. IV. c. 30, s. 9.

<sup>5</sup> 11 & 12 Will. III. c. 7, s. 9, made perpetual by 6 Geo. I. c. 19.

<sup>6</sup> In these days fortunately the providence of the legislature in this respect has become matter of mere curiosity. The particulars, which are not uninteresting, will be found in Ab. on Sh. p. 141, et seq.



ing the charge of the helm and the ship's course through her voyage;<sup>1</sup> and the importance which in the infancy of navigation was naturally enough assigned to the competency and trustworthiness of this officer, is apparent from a barbarous and sanguinary ordinance of the laws of Oleron,<sup>2</sup> by which, in case of gross misconduct on his part, the crew were empowered to lead him to the hatches, and there strike off his head. With us no such officer exists; and the term is used as designating a class of public servants, stationed upon the coasts and in the harbours of the kingdom for the purpose of conducting vessels through the intricate and dangerous navigation of the roads, channels, and rivers by which alone our ports are accessible. The persons to whom this arduous and responsible duty is committed are selected from experienced seamen after a strict scrutiny of their qualifications by a board of competent examiners. The appointment is vested in certain public bodies incorporated by charter or act of parliament; of these the principal are the corporation of the Trinity House, Deptford Strond, the Fellowship of the Cinque Port Pilots, the Trinity Houses of Hull and Newcastle, and a corporation recently created (by the 5 Geo. IV. c. 73) for the same purpose at Liverpool.

A detail of the various regulations established by statute or by the ordinances of these public bodies, falls rather within the province of practical navigation, and would be unprofitably tedious to the legal student. It will be sufficient in this place to give an outline of some of the principal provisions of the consolidating act of 6 Geo. IV. c. 125, which, though in most of its enactments limited to the two corporations first mentioned, contains nevertheless clauses which are of general and important application.<sup>3</sup>

1. The Corporation of the Trinity House, London, is required to license a certain number of skilful persons, qualified by a previous service, the nature and extent of which are particularized, to act as pilots for the navigation of the Thames.

<sup>1</sup> See the Ordonnance de la Marine, liv. 2, tit. 4.

<sup>2</sup> Cap. 23.

<sup>3</sup> A full analysis of the stat. will be found in Maccullock's Dictionary of Commerce, Art. Pilot—together with the bye-laws of the Corporation as approved by the late Lord Tenterden, and the table of rates.

the Medway, and the English Channel, as far as the Isle of Wight. All vessels, with the exceptions hereafter specified, are to be conducted within the limits to which these licences apply by pilots so licensed and by no others.<sup>1</sup> The same corporation is empowered to appoint sub-commissioners of pilotage for the examination of persons to be employed as pilots within limits over which no special jurisdiction extends, upon the recommendation of which sub-commissioners licences may be granted by the Trinity House accordingly.<sup>2</sup> Regulations of a like kind are prescribed for the examining and licensing of Cinque Port pilots by the Fellowship of the Cinque Ports;<sup>3</sup> and lists of all persons appointed within their respective jurisdictions, together with the rules for their government, are to be annually returned from the several corporations to the Trinity House, London, and to the commissioners of customs; which latter again are to transmit the necessary particulars to their officers at the different ports.<sup>4</sup> Every pilot, on his appointment, is to give a bond for the proper discharge of his duties to an amount not exceeding 100*l*.<sup>5</sup>

2. The pilots are subject to the government of the several corporations by whom they are licensed, and bye-laws for that purpose may be made, subject, in the case of the Trinity House, London, to the revision and approval of the Lord Chief Justice of the Court of King's Bench, and, in that of the Cinque Ports, to alterations by the Privy Council on the representation of a party interested.<sup>6</sup>

3. Every pilot duly licensed who shall without sufficient cause refuse or decline going off to any vessel wanting a pilot, upon signal made, or upon being required to do so by the master of, or any person interested in the ship, or by any officer of the corporation to which he shall belong, or principal officer of the customs; or who shall upon any frivolous pretext quit any ship or decline to pilot her after he has been engaged to do so, or after going alongside, without leave of the master, is liable for every such offence to a penalty not exceeding 100*l*. nor less than 10*l*.<sup>7</sup> Precautions also are taken to prevent the improper use of the licence by lending

<sup>1</sup> S. 2, 3.

<sup>2</sup> S. 5.

<sup>3</sup> S. 15, 16.

<sup>4</sup> S. 35, 36.

<sup>5</sup> S. 27.

<sup>6</sup> S. 11, 12, 13, 21, 22.

<sup>7</sup> S. 72.

it to others,<sup>1</sup> and for checking misconduct on the part of the pilot generally.<sup>2</sup> Unlicensed persons may act so long as no licensed pilot offers to take charge of the ship, or makes a signal for that purpose, or where and so long as the ship shall be in distress;<sup>3</sup> but they may at all times be superseded by a licensed pilot, and any unlicensed person who shall continue to act after a duly licensed pilot has offered to come on board and take charge of the ship, is subject to a penalty not exceeding 50*l.* nor less than 20*l.*<sup>4</sup> By a subsequent provision, no person is to take charge of a ship, or to act in any manner as pilot, or receive any compensation as such, without having his licence at the time in his personal custody, and producing the same to the master of any vessel or other person desirous of engaging him, or to whom he shall offer his services, under penalties varying from 10*l.* to 30*l.* for the first offence, and from 30*l.* to 50*l.*<sup>5</sup> for a subsequent offence. Licensed pilots are not answerable for damage occasioned by negligence or want of skill beyond the sum secured by their bond, and the amount of pilotage to which they would have been entitled.<sup>6</sup>

4. The charge for pilotage is regulated by usage or statute, and generally varies in proportion to the draft of the vessel. The Trinity House and Cinque Ports are empowered to fix the rates at their discretion within the limits of their jurisdiction. Careful provision is made for levying the pilot dues on foreign vessels, which may be summarily recovered from the masters of such vessels, or from the consignees or agents who have made themselves liable to any other charges; and these again are empowered to retain the dues so paid out of any monies of the owner which may come to their hands.<sup>7</sup> No pilot is to be taken to sea beyond the limits of his district by any person commanding a vessel, without his free consent, except under circumstances of absolute and unavoidable necessity; and when such necessity occurs, the pilot so taken to

<sup>1</sup> S. 74.<sup>2</sup> S. 42, 43, 68, 73, 75.<sup>3</sup> 71.<sup>4</sup> S. 70.<sup>5</sup> S. 66.

<sup>6</sup> S. 57.—The suits for their fees by pilots are brought in the Admiralty Court, and in cases involving questions of nautical nicety the assistance of some of the Trinity Masters is occasionally called in. See an instance in 2 Hag. 176.

<sup>7</sup> S. 44, 45, 46, 47, 49, 50, 51.

sea is to receive an extra remuneration of 10*s.* 6*d.* per day for all the time so lost to him.<sup>1</sup>

5. Any master of a ship, who shall act himself as a pilot, or shall employ or continue employed as a pilot any unlicensed person, or any licensed person acting out of the limits for which he is qualified, or beyond the extent of his qualification, after any pilot, duly licensed and qualified to act within the limits in which the ship shall then actually be, shall have offered to take charge of the ship, incurs a penalty of double the sum which would have been legally demandable for the pilotage,<sup>2</sup> and an additional penalty of 5*l.* for every 50 tons burden, if the Corporation of the Trinity House, or that of the Cinque Ports, as the case may be, (for the enactments are in terms confined, as has been said, to the jurisdiction of these two bodies,) shall think it proper that the person prosecuting should proceed for the additional penalty, and shall so certify in writing.<sup>3</sup> But the master of the following vessels may pilot them so long as he is not assisted by any unlicensed pilot, or any other person than the ordinary crew, viz. the master of any collier—or of any vessel trading to Norway—the Cattegat—or the Baltic—or round the North Cape—or into the White Sea—or of any constant trader inwards from the ports between Boulogne (inclusive) and the Baltic—(all such ships having British registers, and coming up by the North Channel, but not otherwise)—or of any Irish trader using the navigation of the Thames and Medway—or of any vessel engaged in the regular coasting trade of the kingdom<sup>4</sup>—or wholly laden with

<sup>1</sup> S. 38.

<sup>2</sup> Meaning the pilotage of the whole voyage for which a pilot is necessary, and not for the narrower limits for which the particular pilot may be licensed, according to a decision of the Court of Common Pleas—*Mackie v. Landon*, 6 Taunt. 256.

<sup>3</sup> S. 58. As to the construction of this clause, see 2 Bingh. 219. In *Peake q. t. v. Carrington*, it was held, that to subject the master to the penalty, the offer of the pilot to take charge must be made to or in the presence of the master; and in *Hammond v. Blake*, L. & W. Merc. Cases, 157, that the pilot must *produce* his licence according to the requisites of the 66th section, and that without being requested to do so by the master; otherwise no penalty is incurred.

<sup>4</sup> The 6 Geo. IV. c. 107, s. 100, enacts that all trade by sea from any one part of the United Kingdom to any other part thereof, or from one part of the Isle of Man to another, shall be deemed to be a coasting trade; and all ships while employed therein shall be deemed to be coasting ships.

stone from any of the Channel Islands or the Isle of Man, being the production of such islands—or of any vessel not exceeding sixty tons burden, and having a British register or authority from the Privy Council—or of any ship or vessel whatever, whilst within the limits of the port to which she belongs, unless some special provision as to such port have been made by previous charter or act of parliament.<sup>1</sup> Neither is the master or mate of any vessel, being owner or part-owner, and residing at Dover, Deal, or the Isle of Thanet, liable to any penalty for piloting his own ship up and down the Thames and Medway, or within the jurisdiction of the Cinque Ports.<sup>2</sup> Nor is the penalty incurred by the employing of any person as pilot when the vessel is in distress.<sup>3</sup> Nor by removing the vessel into or out of dock, or changing her moorings after she shall have been duly brought into port by a licensed pilot.<sup>4</sup>

As the taking of a pilot is compulsory, and the selection of the person is not left to the judgment of those in whose service he is employed, it is but equitable that the master and owners should not be responsible for his acts. The statute accordingly provides, "That no owner or master of any vessel shall be answerable for any loss or damage which may happen from the neglect, default, incompetency or incapacity of any licensed pilot acting in the charge of any ship under the provisions of the act, where and so long as such pilot shall be duly qualified to have the charge, or where and so long as no duly qualified pilot shall have offered to take charge thereof."<sup>5</sup> Even without this enactment, it may be doubted whether the common law would have imposed upon the master or owners any liability for the misfeasance of a person, acting under another authority, and altogether independent of their control; and it is upon this principle and in this view, that the clause has been construed as then only protecting from the consequence of mismanagement, when the vessel is in the charge of a pilot whom the master was bound to take; whilst a pilot taken, not compulsorily, but at the discretion of the master, however usual and even expedient the practice, is to be con-

<sup>1</sup> S. 59.<sup>2</sup> S. 62.<sup>3</sup> S. 61.<sup>4</sup> S. 63. There had been some doubt upon this point under the former statutes, which this clause was intended to remove.<sup>5</sup> S. 65.

considered as the servant of the owners, for whose acts consequently they are responsible.<sup>1</sup>

But the statute carries the indemnity of the master and owners still further, by expressly exempting them from all liability for any loss or damage which may happen by reason of no licensed pilot, or no duly qualified pilot being on board, *unless it shall be proved* that the want of such pilot arose from a refusal to take him on board, or from the wilful neglect of the master in not heaving-to or using all practicable means, consistently with the safety of the vessel, for taking on board any pilot who shall offer to take charge of her.<sup>2</sup> And in no case is the responsibility of the owner to be extended beyond the value of the ship and her appurtenances together, with the freight of the then voyage.<sup>3</sup>

III. The regulations, once so important, as to the convoy of merchant-ships by vessels of war, have happily for us and for mankind, ceased to be of present interest. But as it would be presumptuous to hope, however earnestly we may desire, that the repose which for the last twenty years we have been permitted to enjoy, is destined to be perpetual, even if long continued, it may be useful to cast back a glance at the ordinances which the like occasion may again revive.

The risks, to which in time of war merchant-vessels were continually subject, of capture by enemies, suggested the introduction into the contract with the shipper, of an express stipulation or warranty on the part of the owner or master, not to sail without convoy; and in like manner as the risk of loss varied materially as this protection was or was not to be afforded, the departure with convoy became an important condition in the effecting of a policy of assurance. But it is not of these warranties, the consideration of which more properly belongs to other portions of our inquiry, that we are about to speak here. We confine ourselves for the present to those

<sup>1</sup> See *Carruthers v. Sydebotham*, 4 M. & S. 77; *Attorney-General v. Case*, 3 Price, 302. A notion prevails in the port of London, not only among the persons directly connected with shipping, but even, as it seems, at the Trinity House, that the taking of a pilot for an outward bound ship beyond the Downs, though usual, is not compulsory; but that this notion is erroneous will be at once obvious to any person who will carefully read the 2d section of the act. *Under the former statutes the pilots were licensed to the Downs only*, and hence probably the misconception.

<sup>2</sup> S. 53.

<sup>3</sup> S. 54.

compulsory regulations which, during the late war, were prescribed by the legislature, and enforced by the government of this country, as a measure of public policy.<sup>1</sup> By two several statutes, passed in 1797 and 1803,<sup>2</sup> it was enacted that it should not be lawful for any ship belonging to subjects of his Majesty (with certain exceptions) to depart from any port or place whatever, unless under such convoy as might be appointed for that purpose; and the master was required under very severe pecuniary penalties to use his utmost endeavours to continue with the convoy during the whole voyage or such part thereof as the convoy should be directed to accompany the ship, and not to separate therefrom without the leave of the commander. Again, it was declared that in case any ship should depart without convoy contrary to the act, or wilfully separate therefrom, all insurances on the ship, cargo or freight, belonging to the master or to any other person who should have directed or been privy to such departure or separation, should be null and void; and, further, the officers of customs were required not to allow any ship which ought to sail with convoy, to clear outwards from any place in the United Kingdom to foreign parts, until the master should have given bond with one surety, with condition that the ship should not depart without convoy, nor afterwards desert or wilfully separate therefrom. The exceptions were—of vessels not required to be registered—or licensed by the Admiralty—to sail without convoy—or bound from one part of the United Kingdom to another—or belonging to the East India or Hudson Bay Companies—or employed in the Newfoundland fishery: nor did the provisions extend to any ship proceeding with due diligence to join convoy from the port of clearance to the rendezvous, the bond of the master having been previously given; or sailing from a foreign port where no convoy was appointed, and no person authorized to appoint convoys or to grant licences of dispensation.

Upon this statute it was decided that the sailing with convoy thereby required must be a sailing with convoy *for the whole voyage*, or for so long a part thereof as convoy might be ap-

<sup>1</sup> Other countries, on the same view of policy, have adopted similar regulations. See Valin, tom. i. p. 691, and the ordinance of Hamburg, 1731.

<sup>2</sup> 38 Geo. III. c. 76, and 43 Geo. III. c. 57. These acts severally expired at the conclusion of the war in 1802 and 1814.

pointed to go,<sup>1</sup>—that it was a breach of the act, or no exemption from its penalties, to sail from port to port, unless the ship were so bound<sup>2</sup>—that an attempt to overtake the convoy was not a sufficient compliance<sup>3</sup>—that the master ought to apply for and receive sailing instructions from the commander of the convoy, otherwise, if he separated, it would be deemed to be by his own fault<sup>4</sup>—that if a licence had been obtained, the terms and conditions of the licence must be strictly and literally observed<sup>5</sup>—but that on the other hand, if the master had done all which could reasonably be required for compliance with the act, but by accident and without fault on his part, the convoy had sailed without him,<sup>6</sup> or quitted him on the voyage,<sup>7</sup> the provisions of this penal statute, which were not to be too rigorously interpreted, must be regarded as having been substantially satisfied.

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ART. V.—LIMITATIONS TO NEXT OF KIN.

It has been said that, when judges over-rule an authority, they do not create a new state of the law upon the point in question, but that, being the living depositaries of the law, and the true interpreters of it for the time being, they merely declare what the law is and always was. This subtlety, though of admirable use for the purpose of showing that the law cannot be misinterpreted, and that, judges being the fountains of legal truth, the living stream of law must always be pure, affords little practical consolation to a suitor who finds that he loses under one declaration of the law what he gained under another. In fact there is no power by which the rights and interests of the community are more seriously affected than the power which judges possess of undoing the work of their predecessors, and as there is nothing in the nature of a fixed rule or period of limitation to control it, there is no power of which the exercise demands greater deliberation and caution. It is

<sup>1</sup> *Cohen v. Hinckley*, 1 Taunt. 249.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* per Heath, J. ; and see the several cases on the warranty which confirm that opinion, 1 Bos. & Pul. 5 ; 2 Bos. & Pul. 164.

<sup>5</sup> *Hinckley v. Walton*, 3 Taunt. 130 ; *Ingham v. Agnew*, 15 East, 517. See also 4 Taunt. 178, and 6 Taunt. 544.

<sup>6</sup> *Laing v. Glover*, 5 Taunt. 49.

<sup>7</sup> *Williams v. Shee*, 3 Camp. 469.



true that there are many rules of law, and many decided cases, of which the authority, founded upon long acquiescence, is considered, in practice, too sacred to be shaken; but these have not always been respected, and, in the absence of any positive rule upon the subject, it must often depend upon the character of a particular judge, how far their ascendancy will be maintained. One judge, for instance, may be more inclined than another to give effect to the intentions of a testator, or less anxious to uphold the inflexibility of rules of law, and the rule in *Shelley's case* may be put in jeopardy. Another, for the like reason, may think that leaseholds ought to pass under a devise of lands, tenements, and hereditaments, and *Rose v. Bartlett* may be violated; while a third may deem it absurd to hold that a gift of an estate, subject to a mortgage, must be intended to be a gift of the estate exonerated from the mortgage, and *Serle v. St. Eloy*, which has been always disapproved and always followed, may be departed from. Certain it is that where a decision, applicable to a great number of particular cases, has been long acquiesced in, however doubtful or unsatisfactory the ground of it may originally have been, the sudden over-ruling of such an authority is productive of far greater inconvenience and mischief than any possible good that can arise from the substitution of a decision, founded, it may be, upon sounder principles of law. Where a decision, involving a principle of general application, has been undisturbed for twenty or thirty years, and made the foundation of a vast number of professional opinions, it is impossible to say how deeply it may have struck root into the social system; to what extent it may have influenced contracts, family arrangements, and the various transactions connected with the transfer and disposition of property, which constitute so large a portion of the business of human life. Under such circumstances the disturbing force of a counter-decision suddenly pronounced will necessarily be far greater than any beneficial effect that can be reasonably expected to result from the substituted decision. It is not with judges as with the legislature, which, at the same time that it alters the law, has the power of preventing the altered law, to some extent at least, from working a retrospective wrong. The over-ruling of decisions long acquiesced in has always an injurious, if not an

unjust operation upon the interests of those who have acted upon the faith of the decisions over-ruled. The mischief produced is certain and positive, while the benefit that may arise from the new decision is necessarily remote and uncertain, and not unfrequently, from the nature of the subject-matter adjudicated upon, absolutely null. In many cases, where the equities on both sides are equal, it is a matter of little importance whether property be awarded to A. or to B., and all that is necessary for the purposes of justice, and of public policy, is, that the rule which gives it to one or to the other should be fixed and well ascertained. Take, for example, the case of an ultimate disposition of property made by the author of an instrument to his next of kin, in the event of the failure of previous gifts to the particular objects of his bounty; a case which we select because it is the subject of a recent decision of the Lords Commissioners, upon which we are about to make a few observations. Supposing the question of intention to be excluded from consideration, it matters little whether the persons who are nearest in blood to the author of the instrument be held to be entitled under the words "next of kin," or whether those words be held to mean next of kin according to the statute of distributions.

But to whatever class of persons property so limited is to be given, it is of the greatest importance that the law upon the subject should be fixed; and if for the last fifty, and, for any thing that appears to the contrary, for the last hundred and fifty years, the law has given it to one class,—a decision which, after the lapse of so long a period, gives it to another, is so manifestly contrary to policy, that, unless supported by the strongest reasons, and called for by the most stringent judicial necessity, its soundness may well be doubted, and it may at any rate be fairly made the subject of free, but respectful comment.

The decision we allude to was pronounced by the Lords Commissioners in the case of *Elmsley v. Young*;<sup>1</sup> but before adverting more particularly to it, we shall take a short view of the effect of the cases bearing upon the subject.

In *Carr v. Bedford*,<sup>2</sup> a case which occurred in 1677, seven

<sup>1</sup> 2 Mylne and Keen, 780.

<sup>2</sup> 2 Ch. Rep. 146.

years after the statute of distributions, where the testator gave the residue of his personal estate to and amongst his kindred according to their most need, the court held, that the act for better settling intestates' estates was the best rule that could be observed as to the limiting the extent of the word kindred, and decreed accordingly.

In *Griffith v. Jones*,<sup>1</sup> which was decided in 1686, it is said, that of late it had been held, that if a man gave his personal estate among his kindred, the devise should be governed by the act of distribution. It is observable, that the third section of the statute of 22 and 23 Ch. II. c. 10, directs distribution of the clear residue of the intestate's estate to be made amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person, in equal degree, or legally representing their stocks, "*pro suo cuique jure*." Here the words "next of kindred" are clearly, according to the grammatical construction of the passage, applied as well to the representatives of those who are nearest in blood to the intestate, as to the nearest in blood themselves. And in the sixth section of the supplemental statute, 1 Ja. II. c. 17, the term "next of kin" is used in a sense which applies both to the nearest in blood to the intestate, and to their representatives.

In *Roach v. Hammond*<sup>2</sup> (1715) a bequest for the use of the testator's "relations" was held to be distributable according to the statute of distributions; and this decision has been followed in a great number of similar cases, where the word "relations" has been either used alone, or coupled with other words, which do not increase the certainty of the intended objects of the testator's bounty. But wherever in such cases the testator directed a particular mode of distribution, the Court, having ascertained the objects by reference to the statute, did not go on to decree distribution to be made according to the shares and proportions directed by the statute, but gave effect to the expressed intention of the testator in that respect.

Thus in *Thomas v. Hole*,<sup>3</sup> where the testator gave 500*l.* to

<sup>1</sup> 1 Freem. 96, and 2 Ch. Rep. 394.

<sup>2</sup> Prec. in Ch. 401.

<sup>3</sup> Forr. 251.

the relations of E. H. to be equally divided between them, Lord King determined that no relation should take by this description that could not take by the statute of distributions, and as the testator had directed the 500*l.* to be divided equally between them, he accordingly decreed them to take *per capita*.

The case of Phillips v. Garth,<sup>1</sup> which was heard in 1790, before Mr. J. Buller, sitting for the Lord Chancellor, is the first case in which the Court was called upon to put a construction upon the words "next of kin," among whom the testator directed the residue of his estate to be equally divided share and share alike. The words "next of kin," in that case, cannot be said to be used *simpliciter*; and it was no doubt the mode of distribution directed by the testator which created the difficulty. Limitations to "next of kin," without more, must have been of constant occurrence, after the statute of distributions; yet no case is to be found in the books in which a question was raised as to the effect of a limitation to "next of kin." The absence of any case upon this point, during a period of one hundred and twenty years, may be attributed to the circumstance, that the statute was so soon considered by the courts to be the rule to go by in dispositions of property to kindred, that the effect of a limitation to a man's next of kin, unless coupled with some direction as to the mode of distribution inconsistent with the distribution directed by the statute, was considered too clear to be disputed. In Phillips v. Garth the principal contest was as to the mode of distribution, but the point was also raised—and raised for the first time—whether the surviving brothers who were nearest in blood to the testator at the time of his decease, were not entitled to take in exclusion of the representatives of deceased brothers and sisters; in other words, whether the term "next of kin" was to be construed in the sense which it had before the statute, or in the sense in which it is used in the 1 Ja. II. c. 17, s. 6. Mr. Justice Buller was of opinion, that since the last-mentioned statute, the words "next of kin" had acquired a technical meaning, and were to be understood in the sense in which they are there used, unless it appeared upon the will that the testator used them in a different sense; and as to the mode

<sup>1</sup> 3 Bro. C. C. 64.

of distribution, he decided upon the authority of previous cases, that effect must be given to the intention of the testator, and that the distribution, therefore, in the case before him, should be *per capita*, and not *per stirpes*. An appeal from this part of the decision was brought by one of the parties who took by representation, and who was interested in contending that the distribution ought to have been *per stirpes*; and upon the hearing of that appeal Lord Thurlow intimated an opinion that the brothers were alone entitled, and directed the cause to stand over, to afford them an opportunity of presenting a petition of re-hearing; but the matter was afterwards compromised.

The decision in *Phillips v. Garth* has been noticed in terms of doubt or disapprobation by several judges; but as these *dicta* are all commented upon by the Lords Commissioners in the last case of *Elmsley v. Young*, we shall reserve our observations upon them till we come to that case. We should state here, however, that in *Stamp v. Cooke*,<sup>1</sup> a case heard three years before *Phillips v. Garth*, but published for the first time by Mr. Cox in 1816, Lord Kenyon said that "If the residue had been given to the 'next of kin,' and the testator had stopped there, the statute would certainly have been the rule to go by; and although nephews and nieces are not in fact so near as brothers and sisters, yet the fund would have been distributable *per stirpes* according to the statute." In the case before Lord Kenyon, the testator directed his executors "to part the residue of his estate to his next relations, as sisters, nephews and nieces," and Lord Kenyon having stated the proposition above cited, as one which was perfectly clear and indisputable, makes it the foundation of his decision as to the mode of distributing the residue.

In *Hinckley v. Maclarens*<sup>2</sup> exactly the same points arose as in *Phillips v. Garth*, the testator in that case having directed his property to be equally divided among his next of kin, share and share alike; and Sir John Leach, after stating his opinion that *Phillips v. Garth* had not been impeached, except as to the distribution of the property, decided that the words "next of kin," used without explanatory context showing a different intention on the part of the testator, must be taken to mean next of kin according to the statute of distributions, and that the

<sup>1</sup> 1 Cox, 234.

<sup>2</sup> 1 Mylne & Keen, 27.

property in question should be divided among such next of kin, not *per capita*, but *per stirpes*.

In *Elmsley v. Young*,<sup>1</sup> the question was again raised upon an ultimate limitation in a settlement to the next of kin of the settlor; and Sir John Leach adhered to the opinion he had expressed in *Hinckley v. Maclarens*. From his decision in *Elmsley v. Young* an appeal was brought, and, upon the hearing of the appeal before the Lords Commissioners Shadwell and Bosanquet, his decision was reversed. The following is the judgment of Lord Commissioner Shadwell.

“By the instrument which is the subject of the suit, the settlor, Peter Elmsley, in the event of the death of his brother Alexander Elmsley, and failure of his issue, gives a sum of stock to trustees upon trust to pay, assign, and transfer the same to himself Peter Elmsley, if he should be living, and if he should not be living, as he should appoint; and in default of appointment to such person or persons as should at the time of the decease of the said Peter Elmsley be the next of kin of him the said Peter Elmsley, and to and for no other use, trust, intent, or purpose whatsoever. Peter Elmsley died, leaving his brother Alexander, and children of a deceased brother John, surviving him; and the question is, whether the children of the deceased brother shall, by virtue of the words ‘next of kin,’ participate in the fund with the settlor’s brother. It was said that the term ‘next of kin’ means, by force of its own natural import, the persons who take as next of kin by the statute of distributions; but that this is not so is manifest upon the face of the statute itself, in the sixth section of which it is enacted, ‘that in case there be no children, nor any legal representatives of them, then one moiety of the estate is to be allotted to the wife of the intestate, the remainder of the said estate to be distributed equally to every of the next kindred of the intestate, who are in equal degree, and those who legally represent them;’ so that the statute does emphatically, in directing a distribution in a particular case, take notice that the persons who are to take shall be the next of kin, and some other persons, besides the next of kin of the intestate. It is perfectly true that for the purposes of decrees and orders in this court, the term ‘next of kin’ is understood, as a matter of course, to signify those persons who would be entitled under the statute of distributions; a fact which will be manifest upon examination of the forms given in Mr. Seton’s valuable book on decrees. It is by no means true, however, as a general proposition, that the term ‘next

<sup>1</sup> 2 Mylne & Keen, 82.

of kin' is taken to signify those who are entitled under the statute of distributions; and I say so, because, from my own personal knowledge, in marriage settlements, where a limitation is to be made of personal property brought in by the husband or wife in the event of the party bringing it in dying without leaving children, the limitation is never in any well-drawn settlement made to the next of kin, but it is always couched in these words, or words tantamount to them, that the property shall go to the person or persons who would be entitled to the clear residue of the personal estate of the party deceased, in case that party had died unmarried and intestate. This, or some such form of words, is always found in every well-drawn conveyance, and this form of words shows that, in the opinion of conveyancers, a clear distinction exists between next of kin and those persons who are entitled under the statute of distributions.

"It appears that a doubt was first created upon this point by a *dictum* which fell from a most eminent and learned judge, Lord Kenyon, in the case of *Stamp v. Cooke*<sup>1</sup>, which was decided in 1786. It is to be observed, that the only point which it was necessary to decide in that case, was the construction to be put upon the words 'next relations,' coupled with words which went to interpret the testator's meaning, 'as sisters, nephews, and nieces.' It was not necessary to the decision of that point, that Lord Kenyon should use the expressions which are found in the report; Lord Kenyon, however, certainly does say that, 'if the residue had been given to the 'next of kin,' and the testator had stopped there, the statute would have been the rule to go by; and although nephews and nieces are not in fact so near as brothers and sisters, yet the fund would have been distributable *per stirpes* according to the statute.' But though this opinion was expressed by Lord Kenyon, if the report be correct, one cannot at the same time but think, with great humility, that the very words of the statute were not present to his Lordship's recollection, especially as it was not necessary for the decision of the case that any such proposition should be laid down. In 1790, the case of *Phillips v. Garth*<sup>2</sup> came before Mr. Justice Buller, sitting for the Lord Chancellor. In that case, the testator bequeathed the residue of his estate and effects to be equally divided to and amongst his next of kin, share and share alike. Mr. Justice Buller goes at some length into the cases, and he says, 'I cannot distinguish this case from *Thomas v. Hole*; that case is in point, except that there the word is 'relations,' which being to be construed next of kin, makes it this case.' It is not necessary for the

<sup>1</sup> 1 Cox, 234.

<sup>2</sup> 3 Bro. C. C. 64.

decision of the present case, to advert to the construction which has been put upon the word 'relations;' certain it is that in some of the cases, in order to give some certainty to a word in itself of vague and indefinite signification, it has been held that those should take under the description of 'relations' who would have been entitled to take under the statute of distributions. The decision in *Phillips v. Garth* was, that the residue should be divided into thirteen parts, of which the brothers, nephews, and nieces were each to take one share. The cause afterwards came before Lord Thurlow, upon a petition of re-hearing presented by one of the testator's nephews; but Lord Thurlow, inclining much in favour of the right of the brothers, directed the case to stand over to enable the brothers to present a petition, and the cause was subsequently compromised.

"In *Garrick v. Lord Camden*<sup>1</sup>, Lord Eldon says, he had always great doubt upon the case of *Phillips v. Garth*; he states the reasoning upon which Lord Thurlow went in disapproving of Mr. Justice Buller's decision, namely, that 'next of kin,' being the only description, without the addition which is in the statute of those who represent them, the children of the deceased brothers and sisters ought not to take under such a bequest; and it appears that he coincided in opinion with Lord Thurlow. In *Smith v. Campbell*<sup>2</sup>, Sir William Grant says, 'even if the testator in this case had made use of the words 'next of kin,' instead of his 'nearest surviving relations,' yet if there had been nothing in the will to show that he meant the next of kin according to the statute of distributions, I should have thought the brothers and sisters would have been exclusively entitled;' and he proceeds to notice Mr. Justice Buller's decision to the contrary in *Phillips v. Garth*, and Lord Thurlow's disapprobation of that decision. Then we have the case of *Brandon v. Brandon*<sup>3</sup> before Sir Thomas Plumer, where the limitation was to the 'nearest and next of kin of Abigail Brandon;' and the question was, whether the brother of Abigail Brandon was exclusively entitled, or whether children of two deceased sisters were entitled to participate; so that the case is in effect the same as the present, with the addition only that the words were 'nearest and next of kin' instead of the words 'next of kin' by themselves. Sir Thomas Plumer notices the disapprobation of the decision in *Phillips v. Garth* expressed by Lord Thurlow, Lord Eldon, and Sir W. Grant; and he arrives at the conclusion, that the weight of authority is against the doctrine of *Phillips v. Garth*.

<sup>1</sup> 14 Ves. 372.<sup>2</sup> Coop. 277. [This case is better reported in 19 Ves. 400.]<sup>3</sup> 3 Swanst. 312.



The Master of the Rolls took further time to consider the case ; and when he delivered his final judgment, he adhered to the opinion which he had before expressed.

"We have therefore the authority of Sir Thomas Plumer overruling *Phillips v. Garth* in a case which is in terms the same, except as to the addition of the word 'nearest,' which appears to me to make no difference in the case. We have the disapprobation of Lord Thurlow, the disapprobation of Lord Eldon, the disapprobation of Sir W. Grant ; all these judges concurring in the opinion expressed by Sir Thomas Plumer. It appears, therefore, to me, and my brother Commissioner, who will state his own opinion upon the point, that it is impossible to get over the weight of these authorities ; that Sir Thomas Plumer's decision was, both on principle and in point of authority, the right one ; and that the decision of the late Master of the Rolls was wrong. His Honor's decree therefore, as to this part of the case, must be reversed."

The conclusion of Lord Commissioner Shadwell is, that it is impossible to get over the weight of authorities against *Phillips v. Garth*, and his brother Lord Commissioner Bosanquet also comes to the conclusion that "the weight of authority is against that case." Sir John Leach, after an examination of the cases, came to a directly opposite conclusion, for he was of opinion that the decision in *Phillips v. Garth* had not been impeached, except as to the distribution of the property, which Mr. Justice Buller divided *per capita*, and not *per stirpes*, thereby supporting the statute for one purpose, and rejecting it for another. "This," he said, "was directly the effect of Lord Eldon's objection to that decision ; it might also be the effect of Sir William Grant's objection to it in *Smith v. Campbell* ; and if not the effect of Sir Thomas Plumer's objection to it in *Brandon v. Brandon*, the words of the settlement in that case were such as to render the decision not inconsistent with *Phillips v. Garth*."<sup>1</sup>

No notice whatever is taken of *Hinckley v. Maclarens* in Lord Commissioner Shadwell's judgment, and as, in this conflicting state of judicial opinion, it is extremely probable that the point will not be considered as finally settled by the late decision, it may be worth while to consider what ground there is for coming to the conclusion that the weight of authority is against the doctrine of *Phillips v. Garth*, an expression, be it observed,

<sup>1</sup> 1 Mylne & Keen, 31.

which, though adopted by the Lords Commissioners, belongs to Sir Thomas Plumer, who also came to that conclusion, though he was not judicially called upon to do so, in *Brandon v. Brandon*.<sup>1</sup> If the word "authority" is used in its usual and legitimate sense, it is an inaccurate statement of a fact to say that the weight of authority is against the doctrine of *Phillips v. Garth*, for there is only one case in which the same points were raised as in *Phillips v. Garth*, namely, *Hinckley v. Maclarens*; and in that case *Phillips v. Garth* was followed as to the only point in question before the Lords Commissioners. *Phillips v. Garth* itself was not appealed from, except upon a point which did not arise before the Lords Commissioners; and the opinions as to Mr. J. Buller's decision expressed in *Garrick v. Lord Camden*, *Smith v. Campbell*, and *Brandon v. Brandon*, all fall under the head of *dicta*.

Let us endeavour to see whether there is any ground for the observation of the late Master of the Rolls, that *Phillips v. Garth* is not impeached by these *dicta* upon the point before the Lords Commissioners, or whether Sir John Leach's judgment in *Hinckley v. Maclarens* was so entirely erroneous, as not even to call for the notice of one of the judges, who was re-hearing the case; for *Hinckley v. Maclarens* was substantially the case re-heard before the Lords Commissioners, inasmuch as Sir John Leach decided the case of *Elmsley v. Young*, as to the point in question, merely by referring to the judgment he had delivered in *Hinckley v. Maclarens*.

In *Garrick v. Lord Camden*<sup>2</sup> the question was, whether the widow of the testator, for whom a large provision had been made in the will, was entitled to a moiety of the residue of the testator's estate, which he directed to be divided among his next of kin, as if he had died intestate. The testator, at the time of making his will, and at his decease, had two brothers and a sister, and no child of a deceased brother or sister,<sup>3</sup> and Lord

<sup>1</sup> 3 Swanst. 312.

<sup>2</sup> 14 Ves. 372.

<sup>3</sup> The state of Mr. Garrick's family at his death is not stated in the report, and Sir Samuel Romilly is made to say in the argument that the testator left two brothers, and a nephew by a deceased brother. This is inaccurate, and inconsistent with what is said by Lord Eldon in his judgment. We have examined the Registrar's book, and find that the testator left two brothers and a sister, his only next of kin surviving him. The decree, as to this point, is as follows:—"His Lordship doth declare that the residue of the testator's personal estate directed by

Eldon was of opinion, upon the whole context of the will, that the next of kin, exclusive of the widow, were entitled to the whole residue. It is clear that neither of the points determined in *Phillips v. Garth* could be touched by this decision, and that any observation, therefore, made by Lord Eldon upon that case, must be considered as *obiter dictum*. What Lord Eldon did say was as follows:—

“ I admit there is difficulty in giving the full, technical sense to all the words of this will ; the expression of this last clause, that the surplus should be divided among his next of kin, as if he had died intestate, authorizing the observation that, if he had died intestate, the whole could not be divided among his next of kin, that not being the course of distribution according to law ; but the same objection occurs upon the words ‘ relations entitled by law.’ *There is, however, another construction.* I always had great doubt upon the case before Mr. Justice Buller, who thought those who were to take *per stirpes*, as well as those taking *per capita*, were included. Lord Thurlow doubted that, upon this very technical reasoning, to which he was much addicted in the construction of these instruments ; that ‘ next of kin’ being the only description, without the addition, which is in the statute, of those who represent them, the children of the deceased brothers and sisters ought not to take under that bequest. It is very difficult to say they would not have taken under this will, my construction being, that the next of kin should take the whole, as they would take under an intestacy ; and, upon the whole, I think the widow is not one of the next of kin in the ordinary sense, or in the sense in which the testator used the words.”

The doubt here expressed upon *Phillips v. Garth* does not, we suppose, constitute much of the weight of authority against that case. The ground of Lord Eldon’s doubt is itself somewhat doubtful, and the only thing to be collected with certainty from this passage is, that the ground of Lord Eldon’s doubt was not the same as Lord Thurlow’s. There is possibly something omitted in the report ; but, if the report be correct, we think that, by attending to the context which precedes and follows the sentence above printed in *Italics*, we may collect

the will of the testator to be divided among his next of kin, as if he died intestate, belonged to the personal representatives of the late defendants, George Garrick, Peter Garrick, and Merial Docksey, who were the brothers and sister of the testator, and his only next of kin at the time of his death.”

the train of reasoning in Lord Eldon's mind, and, in so doing, recognize the soundness of Sir John Leach's conclusion, that Lord Eldon's objection to Mr. Justice Buller's decision referred rather to the mode of distribution, than to the persons entitled to take. Lord Eldon is adverting to an argument urged at the bar on the part of the widow, that it would be impossible to give a strict literal construction to the words of the testator, for the Court could not give the whole residue to the brothers and sister of the testator, as if he had died intestate, because if he had died intestate, the law would have given a moiety of the residue to the widow, and that therefore the most reasonable construction was that the testator intended those persons who would be entitled in case of intestacy. This difficulty is admitted by Lord Eldon, but he answers the argument thus: the Court is not driven, on account of that difficulty, to let in the widow against the plain intent of the testator to be collected from the will; there is another construction, namely, to hold that the next of kin, not including the widow, are entitled to the whole, as they would take under an intestacy. And then he proceeds to notice the case of *Phillips v. Garth*, where a similar difficulty was occasioned by the direction of the testator to divide the residue of his estate equally among his next of kin, who, if they were to be ascertained by the statute, would be entitled to unequal shares, some taking *per stirpes*, and some *per capita*. It was not necessary to notice the case of *Phillips v. Garth*, because, as there were only brothers and a sister in the case before the Court, no question could arise, either as to the persons entitled to take as next of kin, or as to the mode of distribution; but the case seems to have suggested itself to Lord Eldon as illustrating the difficulty arising from a mode of distribution directed by a testator among his next of kin, inconsistent with the distribution directed by the statute. In fact, Mr. Justice Buller's opinion that the representatives were included under the words "next of kin," as well as the nearest in blood, seems to be stated, not as the reason for Lord Eldon's doubt, but as part of the history of the case, and for the purpose of introducing the ground of Lord Thurlow's doubt, of which Lord Eldon speaks with disapprobation. It is clear, at any rate, that even if Lord Eldon doubted whether the representatives ought to

have been let in to any share, it was for a different reason from Lord Thurlow's, and it might be that he thought the very direction for an equal division excluded the notion that the testator intended representatives to take under the description of next of kin. If that were the ground of Lord Eldon's doubt, it would certainly be inconsistent with the observation of Sir John Leach, that his objection to *Phillips v. Garth* was confined to the distribution *per capita*, but it would prove nothing as to his opinion of the construction to be put upon the words "next of kin" taken *simpliciter*, and the *dietum* would consequently avail nothing against the decision of Sir John Leach in *Elmsley v. Young*.

The chief use of this passage in Lord Eldon's judgment is, that we learn from it what was the ground upon which Lord Thurlow objected to Mr. Justice Buller's having included representatives under the word "next of kin," and that Lord Eldon did not approve of the very technical reasoning upon which that objection was founded. Lord Thurlow, it seems, thought that the children of deceased brothers and sisters ought not to have been included, because the words "next of kin" were unaccompanied with the addition, to be found in the statute, of those who represent them. To this objection, founded upon the language of the statute, the answer seems to be that the statute nowhere uses the words "next of kindred" without more, as descriptive of "the nearest in blood;" and that it applies the term "next of kindred" as well to the representatives of the nearest in blood, as to the nearest in blood themselves. Thus in the third section we have the words "next of kindred in equal degree, and legally representing their stocks, *pro suo cuique jure*;" where the word "representing" agrees with "next of kindred." The statute of distributions therefore, so far from fixing the meaning of the words "next of kin," and recognising any definite sense of those words, applies them to two different classes of relations; and the supplemental statute, 1 Ja. II., c. 17, uses the words "next of kin" as a collective term, comprehending all the persons entitled to take under the statute of 22 & 23 Ch. II. c. 10. Mr. Justice Buller was of opinion that since the supplemental statute, the words "next of kin" had acquired a technical signification, by which the

author of an instrument would be bound, if the words were unaccompanied by any explanatory context. Whether that opinion be correct, or whether we look to the ambiguity raised by the use of the term in different senses in the statute of distributions and the supplemental statute, the consequence will, in either case, be the same as to the construction to be put upon the words "next of kin" used *simpliciter*; for all the authorities concur in this, that where there is ambiguity the knot is to be cut by a reference to the statute. Of the ambiguity of the words "next of kin," used *simpliciter*, there cannot be a stronger proof than the instance put by Lord Commissioner Shadwell of the periphrastic language to the use of which conveyancers are driven, in order to describe the persons entitled to take under an ultimate limitation of property brought in by the husband in a marriage settlement. Why is that long and circuitous description resorted to, but to remove the ambiguity as to the meaning of the words "next of kin," which has been created by the statute of distributions and the statute 1 Ja. II., c. 17, and to exclude the claim of the wife?

In *Smith v. Campbell*<sup>1</sup> the bequest was to the testator's "nearest relations," and Sir William Grant decided that the brother and sisters of the testator were entitled in exclusion of the children of a deceased brother. Upon what ground? because he thought that there was no ambiguity in the expression "nearest relations," and that it was as easy to ascertain who they were as the next of kin under the statute. It is true that Sir William Grant does say in this case, that "even if the words were "next of kin," yet if there was nothing to show that the testator had reference to the statute of distributions, or to a division as in the case of intestacy, the inclination of his opinion would be that the nearest of kindred only were entitled, and that brothers and sisters would exclude nephews and nieces from participating in such a bequest; and he proceeds to notice *Phillips v. Garth*, and the doubt expressed upon that case by Lord Thurlow and Lord Eldon. But he goes on to observe that, supposing *Phillips v. Garth* to be right, it went upon a principle, namely, the technical signification which, according to Mr. J. Buller, the words "next of kin" had received, which left the case

<sup>1</sup> 19 Ves. 400.

before him untouched. Not only, therefore, is *Smith v. Campbell* no authority against *Phillips v. Garth*, but it is expressly declared by Sir William Grant to be wholly untouched by *Phillips v. Garth*; and although that learned judge states what the inclination of his opinion would have been had the words been "next of kin," it by no means follows that he would have over-ruled *Phillips v. Garth*, had a case involving the same point come before him. Sir William Grant's observation upon *Phillips v. Garth* in this case is undoubtedly a strong *dictum*, but still it is only a *dictum*, the case before the court being declared by the judge himself to be one which was untouched by the case incidentally alluded to.

In this state of the cases, *Brandon v. Brandon*,<sup>1</sup> where the limitation in the settlement was "to the nearest and next of kin of A. in equal shares among them," came before Sir Thomas Plumer; and that learned judge decided that, under this limitation, a brother of A. was entitled in exclusion of the children of deceased sisters. So far Sir Thomas Plumer's judgment was a decision upon the point which the Court was called upon to determine; but the singular circumstance connected with the judgment is, that the learned judge goes on to decide that the weight of authority was against the doctrine of *Phillips v. Garth*, having previously declared that the case of *Phillips v. Garth* was directly in point with the case before the court; in other words, that the expression "nearest and next of kin," was not to be distinguished from the expression "next of kin." How widely different was this careless declaration from the sound and cautious observation of Sir William Grant, that the decision in *Phillips v. Garth* left the case of *Smith v. Campbell* untouched, because *Phillips v. Garth* was decided upon the ground that the words "next of kin" had received a technical signification, whereas the words "nearest relations," in *Smith v. Campbell*, had not received any technical construction. To assert that a case of limitation to the "nearest and next of kin," is a case precisely in point with a limitation to the "next of kin," is as much a contradiction in terms as to say, that two different things are the same thing, or that an expression standing alone, and that expression with something added to it, are the same expres-

<sup>1</sup> 3 Swanst. 312.

sion. In the expression "nearest and next of kin," the word "next" either adds something to the meaning of "nearest," or it adds nothing, and is consequently superfluous. If it adds nothing to the meaning of "nearest" and is superfluous, then the whole expression is equivalent to "nearest of kin," and nothing turns upon the meaning of "next of kin," the point in *Phillips v. Garth*. But the word "next" may be used for the purpose of adding something to the meaning of the word "nearest;" it is possible for instance,—and this is not a very remote possibility,—that the settlor might have meant by the words "next of kin" the representatives of the nearest, or, in the words of the statute, "the next of kindred legally representing their stocks." And such a possibility might well have suggested itself to Sir Thomas Plumer, who in his judgment says, "the statute clearly adverts to two classes,—next of kin in equal degree, and next of kin by right of representation, not confounding but expressly distinguishing them."

Not only is the foundation of Sir Thomas Plumer's decision, as it is called, against *Phillips v. Garth*, plainly erroneous, but scarcely an observation made by that learned judge, with reference to the case of *Phillips v. Garth*, will bear examination. Thus he says that "if *Phillips v. Garth* had been followed, he should have been unwilling to contradict it." Where had it ever been departed from? Again, he says "In *Smith v. Campbell* the late Master of the Rolls, putting the very case now before the court, adds, that he should have decided in favour of the brother. That opinion was uttered after a review of all the authorities."

There are three inaccuracies in this short passage; in the first place, the case put by Sir William Grant was not the case then before the court: secondly, Sir William Grant did not say that he should have decided in favour of the brother; that might be matter of inference, though by no means of necessary inference, from the language he used, but what he did say was, that if the words in the case before him had been "next of kin," the inclination of his opinion would have been that nearest in kindred only were entitled, and that brothers and sisters would exclude nephews and nieces. Thirdly, this opinion was not uttered after a review of all the



authorities, for this obvious reason, that there were no authorities to review. From the year 1790, in which *Phillips v. Garth* was decided, down to 1819, in which *Brandon v. Brandon* came before Sir Thomas Plumer, no case had occurred involving the same points as those raised in *Phillips v. Garth*; and the only case, in all that period, containing a *dictum* respecting *Phillips v. Garth*, was the case of *Garrick v. Lord Camden*, which is necessarily therefore the only ease upon this point referred to by Sir William Grant.<sup>1</sup> As this is a matter of fact, and not of reasoning or opinion, we have no hesitation in saying that the judgment of Sir Thos. Plumer in *Brandon v. Brandon*, as far as it relates to *Phillips v. Garth*, is altogether inaccurate, and that the late Master of the Rolls was perfectly right in coming to the conclusion, "that the words of the settlement in *Brandon v. Brandon* were such as to render the decision in that case not inconsistent with *Phillips v. Garth*." His Honour of course alluded to the decision upon the point before Sir Thomas Plumer, and to that only.

It can hardly be doubted that the probable intention of a party making a limitation to his next of kin would, in a great number of cases, be better effectuated by giving the property so limited to the next of kin according to the statute, than to the next of kin in equal degree. Suppose, for instance, the nearest in blood were an unmarried brother or sister, and that there were numerous children of deceased brothers and sisters. What testator or settlor, contemplating such a state of his family, would not prefer a distribution of his property according to the statute, to a disposition of it which would enable an unproductive bachelor, or an antiquated spinster, to sweep away the whole of it, and leave the younger branches of his family destitute? Is it not the natural feeling of every man, whose brothers or sisters may have died in his lifetime, that, in making an equitable disposition of his property among his relations, the children of such brothers and sisters ought not to be deprived of that share of his bounty, which, but for the death of their parents, those parents would have received? Again, a testator might bequeath his property to his next of

<sup>1</sup> There is only one other case (*Edge v. Salisbury*), upon another point, referred to by Sir W. Grant in his judgment.

kin, and leave children, and grandchildren, the issue of deceased children? Does it consist with the experience which teaches us that the affection with which men regard their descendants in the second degree is stronger even than that which they entertain towards their own offspring, to suppose that the intention of such a testator would be effectuated by a construction of the words "next of kin" which would deprive his grandchildren of all participation in his bounty? Many persons, perhaps most persons, making a limitation to their next of kin, may mean that their property should go to those, to whom the law would give it, if they made no express disposition of it; and in such cases the intention of the author of the instrument would generally be defeated by a construction which gives the property to a part only of the persons to whom property undisposed of is given by law. We think, however, that the construction to be put upon the words "next of kin," is rightly considered as a question depending entirely upon authority. That question was decided forty-five years ago, and it is admitted on all hands that, unless there be authority against it, it ought not to be disturbed. It was conceded by Sir T. Plumer, that "if *Phillips v. Garth* had been followed, he should have been unwilling to contradict it; it is conceded by Lord Commissioner Bosanquet, that "if the case of *Phillips v. Garth* had been unopposed by authority, the Court would have been extremely unwilling to disturb an opinion pronounced so long ago, and which had been acquiesced in;" and the judgment of Sir John Leach in *Elmeley v. Young* was reversed by the Lords Commissioners expressly upon the ground that the weight of authority was against the decision of Mr. Justice Buller. Now, with all deference to the opinion of the Lords Commissioners, who both concur in adopting Sir T. Plumer's conclusion, and even his language in this respect, we must say that, if any thing be capable of demonstration upon a subject of this kind, it is demonstrable that, unless authority and *dictum* be the same thing, whatever authority there is, or was before their decision, upon the point respecting the construction of the words "next of kin," is in favour of the decision in *Phillips v. Garth*, and that there is no authority whatever except their own against it. We venture to think

this demonstrable, because there have been only two cases since *Phillips v. Garth*, namely *Hinckley v. Maclarens*, and *Elmsley v. Young*, in which the question as to the construction to be put upon the words "next of kin" was raised, and in both those cases the decision of Mr. Justice Buller was followed. As to the other point, namely, the question of distribution, *per capita* or *per stirpes*, as it did not arise in *Elmsley v. Young*, we shall only observe that Mr. Justice Buller has been somewhat hardly dealt with, as well by the Lords Commissioners, as in other quarters. Lord Commissioner Bosanquet, for instance, says, "he believes there is no case in which such a distribution has been directed, as that made by Mr. Justice Buller in *Phillips v. Garth*." Now *Thomas v. Hole* was a case exactly in point in this respect, and Mr. Justice Buller, being a common law judge sitting for the Lord Chancellor, and finding the authorities in favour of a distribution *per capita*, though inconsistent with the statute, where the testator had in effect directed it, actually directed such distribution against the inclination of his own opinion; for he says "if it had pleased the Court originally to say that next of kin should take in the same manner as under the statute, I should not have objected to it, *for it seems to me they should take per stirpes*." Mr. Justice Buller found a rule established, and though he thought a better rule might have been originally adopted, he took the prudent course of not disturbing the rule which had been laid down and long acquiesced in. We shall conclude by referring to a short judgment of Lord Thurlow,<sup>1</sup> which is extremely pertinent to the subject of this article, and which was pronounced upon a collateral question, namely, what construction was to be put upon the word "relations?" His lordship said the difficulty was how to construe the word "relations" but by a reference to the statute of distributions. If it was a recent matter, there might be a doubt; but he took the statute to be declaratory of the old law. "When once," he added, "a rule has been laid down, it is best to abide by it. We cannot always be speculating what would have been the best decision in the first instance."

<sup>1</sup> *Rayner v. Mowbray*, 3 Bro. C. C. 234.

ART. VI.—PLEADING AND PROOF OF CONSIDERATION, IN  
ACTIONS ON BILLS AND NOTES.

THE introduction of the new Rules of Pleading has given rise to a good deal of controversy upon this subject, the decisions on which it may be useful to sum up in this place.

Under the old plea of *non assumpsit*, our readers are aware, it was competent to the defendant to give evidence of original want of consideration, and the only question was how far such evidence cast upon the holder the burden of proving that he gave value for the transfer of the bill or note to himself. But by the rules of Hilary Term, 4 Wm. IV. the plea of *non assumpsit* being abolished altogether in actions on bills and notes, it was provided also, that in this as well as every other species of *assumpsit*, all matters in confession and avoidance—among which were given as instances, illegality of consideration, and the drawing, indorsing, accepting &c. bills or notes by way of *accommodation*—should be specially pleaded. And it has been recently stated by the judges, on several occasions,<sup>1</sup> that the object of the rule was not merely to compel the defendant to plead *negatively* and generally the want of consideration, but *affirmatively* to set forth the facts from which such want of consideration would appear. “The intention,” says Lord Abinger,<sup>2</sup> “of these new regulations being to give the plaintiff due notice of the real defence which is to be set up, would manifestly fail if such a general plea could be sustained; the plaintiff would be left in the same state of uncertainty in which he formerly was before these rules of pleading were introduced. . . . The plea of the special matter is not to be confined to the effecting the same purpose as a mere notice to prove the consideration.” Accordingly, a general plea in the negative, stating that “the defendant accepted [or made] the said bill [or note] without any value or consideration for his so doing, or for his paying the amount thereof, or

<sup>1</sup> *Easton v. Pratchett*, 1 C. M. & R. 806; 4 Tyr. 472; *Lacey v. Forester*, 2 C. M. & R. 59; *Stoughton v. Earl of Kilmorey*, ib. 72; *Mills v. Oddy*, ib. 103.

<sup>2</sup> 1 C. M. & R. 807.

any part thereof"—or "that the defendant indorsed the bill without having or receiving any value or consideration for or in respect of his said indorsement, and that he has not had any value or consideration whatever in respect of such indorsement"—has been held bad when objected to on special demurrer.<sup>1</sup> If, however, the plaintiff choose to take issue upon such a plea, and the jury find against him, the plea, as it has been also decided, cannot be impeached after verdict;<sup>2</sup> for the issue being so joined, both parties are necessarily at liberty to go into evidence as to the consideration for the acceptance or indorsement. It was objected to the statement "that *the defendant had and received* no value for his indorsement," that this was at all events insufficient, inasmuch as it did not necessarily exclude the case of a transfer of the bill by way of *gift* from the defendant, nor the case of a consideration not capable of tangible possession, as the forbearance to sue, or the guarantee of a third person's debt—which, it was contended, could not be regarded as a consideration "had and received *by the defendant*." But to the former objection it was answered, that although the indorsement by way of gift might in one sense be said to be without consideration, as it was without *pecuniary* consideration; yet if it could be the subject of an action, it could only be on the ground that there *was*, legally speaking, some consideration,—as of favour or affection, or the desire to promote the interests of another: but further, that it was at least extremely doubtful whether in fact the giver would be liable in law upon his indorsement to the party to whom he gave the security, although he would be precluded from recovering it back.<sup>3</sup> To the latter objection the answer of the Court was, that whatever be the nature of the consideration, whatever form it takes, if it be actually obtained, the party *may*, both in legal and in common language, be said to have had and received it. "If a man is to have credit, and it is given to him, it is that for which he stipulates; so, if a bill is given for forbearance, the party may be said to

<sup>1</sup> *Easton v. Pratchett*; *Stoughton v. Lord Kilmorey*; *Mills v. Oddy*; *Reynolds v. Ivimey*, 3 D. P. C. 453.

<sup>2</sup> *Easton v. Pratchett*, *suprà*; affirmed a few weeks ago in the Exchequer Chamber.

<sup>3</sup> See *Holliday v. Atkinson*, 5 B. & C. 501.

have the consideration, because he actually possesses the benefit of that forbearance."

But a further question has arisen: where, on a plea pleaded in the general negative form we have been referring to, the replication merely alleges, in equally general terms, that there *was* a good consideration for the acceptance or indorsement, upon which the issue is joined,—on whom is the onus thrown of proving consideration in the first instance? The Court has answered in several cases,—on the defendant; for although the affirmative of the issue, in point of form, is upon the plaintiff, yet inasmuch as by the law merchant an acceptance or indorsement in itself *primâ facie* imports that it was given for *some* consideration, and the plaintiff has not tied himself down to the proof of any *particular* kind of consideration,—the replication alleging no more than the bill itself imports, the case stands exactly as it would have done, before the new rules, on the general issue.<sup>1</sup> And even where the plaintiff proceeded to state the nature of the consideration thus far, "that the defendant did receive consideration for the said acceptance, *to wit*, two cows sold and delivered by the plaintiff to the defendant," concluding to the country,—it was held that the replication was in effect no more than a traverse of the plea; and though the plaintiff had gone on to allege under a *videlicet* what the consideration was, he had shown, by concluding to the country, that the words under the *videlicet* were introduced merely as parcel of the traverse, and not as a new matter on which issue was to be taken.<sup>2</sup> If, indeed, the plaintiff is so unnecessarily communicative as to allege the kind of consideration on which he relies, in such a manner as to give the defendant an opportunity of traversing the allegation, and he avails himself of it, the plaintiff brings upon himself the burden of proving that the security was given for the precise kind of consideration which he has specified. And it has been expressly decided that a replication in the general form

<sup>1</sup> Batley v. Catterall, 1 M. & Rob. 379; Morgan v. Cresswell, K. B. Hil. T. 1835; Lacey v. Forrester, *suprà*.

<sup>2</sup> Low v. Burrows, 4 Nev. & Man, 366.

above mentioned is a sufficient answer to a general plea of want of consideration, even on special demurrer.<sup>1</sup>

The more general and important question, how far, upon an issue properly tendered and taken, the proof by the defendant of original want of consideration—in other words, the proof that the bill was an accommodation bill—casts upon the plaintiff the *onus* of proving that *he* gave value, (on which we offered some remarks in a former number,<sup>2</sup>) must, notwithstanding the authority of the case of *Heath v. Sansom*,<sup>3</sup> still be considered as involved in much uncertainty. Mr. Justice Patteson, who, in that case, assented to the opinion expressed by the majority of the Court, and said that independently of the circumstances of suspicion thrown upon the plaintiff's title, on the point of *practice* alone he should think the defendant entitled to succeed, has since distinctly withdrawn his adhesion to that opinion; stating unequivocally<sup>4</sup> that he considers the doctrine broached on that occasion as incorrect, and that the consideration of the judges having since been more specially directed to the subject, the prevalent opinion among them is, that the Courts have of late gone too far in restraining the negotiability of bills and notes. On the other hand, in a still more recent case,<sup>5</sup> Lord Abinger has given the strong sanction of his authority and experience to support the opposite view of the question. It was not indeed presented distinctly and necessarily for the judgment of the Court, but his lordship stated without reserve, and in considerable detail, the opinions he entertained on the subject. The plea alleged that the defendant accepted without consideration, and that the plaintiff (the indorsee) was a holder without consideration. The latter allegation was denied by the replication, which therefore admitted the former. The case was rested, for the plaintiff, directly and strongly upon the principle that the indorsement of itself imported a consideration, and that

<sup>1</sup> *Bramah v. Roberts*, 1 Bing. N. C. 469; *Prescott v. Levi*, 3 Dowl. P. C. 403; *Stoughton v. Earl of Kilmorey*, *suprà*.

<sup>2</sup> Vol. viii. p. 122.

<sup>3</sup> 2 B. & Ad. 293.

<sup>4</sup> *Whitaker v. Edmunds*, 1 M. & Rob. 367.

<sup>5</sup> *Simpson v. Clark*, Exch., Trin. T. 1835.

the fact of the *acceptance* without consideration could not affect that presumption. Lord Abinger questioned the correctness of the principle itself. "I have no doubt," he said in the course of the argument, "that nine hundred out of a thousand of the bills that come into the hands of bankers in London are indorsed without any value at all, but merely transmitted to agents to receive the amount." "It rather surprised me," his lordship afterwards observed, "to hear that doubts exist upon this question; for, throughout a very long experience, I can certainly say that the *practice* has been, that where a defendant has proved original want of consideration, that called upon the holder to prove consideration given by himself. In no instance, as far as I remember, has this rule been brought into question. And this view is confirmed on looking into the cases." His lordship then referred to the case of *Fentum v. Pocock*<sup>1</sup> as illustrating the view he took of the question, inasmuch as the point which was there the subject of discussion could not have arisen, unless the practice had been for the holder to prove consideration, in order to remove the suspicion that he was an agent of the drawer. He proceeded, however, to put the case upon a ground which certainly has in some degree excited our surprise, as applied to *that* side of the question,—namely, that it is inexpedient to encourage the manufacture of accommodation bills and notes, as having in themselves something of a fraudulent character. We should unquestionably have supposed that every difficulty thrown in the way of the holder's recovering upon them was so much gain to the concocters of the fraud, if fraud there be. His lordship would appear, on the contrary, to be of opinion that the more easily the acceptor of an accommodation bill escapes, the less injurious is the fraud to the commercial interests of the country. "The effect of an accommodation bill," he said, "is to make it a mere nullity as between the parties to its concoction. Why then should you infer that every indorsee by a blank indorsement gave value? The inference rather is that he is an agent; at all events the presumption is as strong one way as the other. . . . If the effect is that no bill exists between the

<sup>1</sup> 5 Taunt.



two parties to its creation, I see no danger to the negotiability of bills in disabling a party from recovering *who receives it without value*, and who takes shelter under a presumption of law that he has given value, and may defraud both the drawer and acceptor. We cannot so get rid of our experience as to suppose that there is something in accommodation bills so precious, that the presumption is always to be in favour of the holder." His lordship's argument assuredly appears to us somewhat to presume the other way.—Mr. Baron Bolland also intimated the inclination of his opinion to be in favour of the view taken by the majority of the judges in *Heath v. Sansom*. Mr. Baron Gurney's impression appeared to be against it: "In the case of an accommodation bill," he observed, "*which is sent into the world for the purpose of raising money*, the presumption may not unnaturally be that that purpose is carried into effect, and that money has been in fact raised." Such being the dissonance of opinion on the Bench upon this question, so important in itself, and of such continual occurrence in practice, it is to be hoped that an occasion will speedily present itself for bringing it under the consideration of all the judges for a deliberate and final settlement. In the meantime, we may observe that it has been again distinctly determined, that the want of consideration as between the original parties is at all events no answer of itself, on the record, to a declaration at the suit of an indorsee.<sup>1</sup>

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<sup>1</sup> *Low v. Griffiths*, 1 Bing. N. C. 267; *French v. Archer*, 3 Dowl. P. C. 130.

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**ART. VII.—WHETHER FIXTURES CAN BE DEEMED GOODS AND CHATTELS IN THE REPUTED OWNERSHIP OF A BANKRUPT.**

THERE have been so many recent decisions on this subject that it seems desirable briefly to recapitulate the leading cases, and to extract from them the principle which has been relied upon for their determination.

In *Ryall v. Rowles*,<sup>1</sup> the parent of the class, W. H., the owner in fee simple of a messuage and brew-house, mortgaged the same, together with the coppers and utensils belonging thereto, and afterwards became bankrupt, having continued in possession of the mortgaged premises and carried on the trade of a brewer. It was held, that the mortgagee was entitled to the fixtures but not to the moveable chattels. Lord Chief Baron Parker observed, “as to the goods fixed, they are, like trees, considered in law as part of the freehold. The things fixed to the brew-house had been several times mortgaged distinct from the brew-house, but were vested in W. H. afterwards, and there was no occasion to deliver them to the mortgagee, but they will pass by the mortgage of the brew-house with the things fixed. I admit that during the term the goods may be sold, but the present is distinguishable, there being a mortgage; nor could the mortgagor remove the fixtures because of the mortgagee’s act, otherwise great inconvenience would follow, as the lessor of a brew-house, with his own fixtures, would be liable to be stripped thereof.”

In *Horn v. Baker*,<sup>2</sup> the lessee of land having erected a distillery thereon, demised the same to two persons, who carried on trade thereon, and who afterwards became bankrupt, and it was held that the fixtures did not pass to the assignees. As to them, Lord Ellenborough, in delivering judgment, merely observed, “the stills, it appears, were fixed to the freehold, and as such, we think, would not pass to the bankrupts’ assignees under the description of goods and chattels in the statute.”

<sup>1</sup> 1 Ves. Sen. 348.

<sup>2</sup> 9 East, 215.

In *Clark v. Crownshaw*,<sup>1</sup> L. took a lease of a mill and iron forge, and purchased the fixtures and moveable utensils from the landlord, and afterwards assigned the same by way of mortgage, and eventually became bankrupt. It was held, that as to the fixtures, the case was not distinguishable from *Horn v. Baker*; Parke, J., observing, that the ground of decision there was, that the stills were fixed to the freehold, and would not pass to the assignees as goods and chattels under the statute, by reason of reputed ownership in the bankrupt.

In *Coombs v. Beaumont*,<sup>2</sup> a steam-engine, erected by the lessee of a colliery at the joint expense of himself and the lessor, and which it was stipulated should be the property of the lessor subsequent to the use thereof by the tenant, was decided not to pass to the assignees of the tenant on his becoming bankrupt; and Parke, J., observed, "The steam-engine, if affixed to the freehold, clearly does not pass to the assignees, because it does not come within the description of goods and chattels in the 6 Geo. IV. c. 16, s. 72. This was determined in *Horn v. Baker*, and since that case, as far as my experience goes, I never knew that any distinction was made between such fixtures as would be removable between landlord and tenant, and such as would not." In this case, counsel, in argument, cited a dictum of Sir George Rose, "that where fixtures are capable of removal by an out-going tenant, without injury to the freehold, they are in the order and disposition of such tenant within the bankrupt law;" and the observations by Mr. Justice Parke seem to have been made in answer to this notion.

In *Boydell v. M'Michael*,<sup>3</sup> the lessee of a house, who was the owner of several fixtures contained therein, having assigned the same by way of mortgage, became bankrupt, and it was decided that the fixtures were not goods and chattels within his order and disposition, and did not pass to his assignees. Parke, B., who declared the judgment of the Court, considered the fixtures as part of the freehold during the term, the tenant having a right to remove them. He

<sup>1</sup> 3 Barn. & Adol. 804.

<sup>2</sup> 5 Barn. & Adol. 72.

<sup>3</sup> 1 Crom., Mee. & Ros. 177.

considered them, being fixtures, as part of the realty, though the law gave to the tenant the right to remove them during the term. Alderson, B., observed, "This question turns entirely on the nature of the property. It is clear that nothing of a freehold nature is within the meaning of the clause in the Bankrupt Act as to order and disposition. It was settled, in the case of *Horn v. Baker*, that fixtures were not within the meaning of the statute of James; the simple and plain rule is, that fixtures are not goods and chattels within the order and disposition of the bankrupt."

In *Ex parte Lloyd*,<sup>1</sup> two partners erected a steam-engine, &c. upon freehold ground belonging to one of them, and then joined in mortgaging the same, and afterwards became bankrupt, when it was held that the mortgagee was entitled to the fixtures. The Chief Judge observed, that the articles in question, though annexed in fact to the building, still retained in law their character of personal chattels, but that being firmly attached to the floor and walls of the building, and only capable of being detached by severing parts of the building itself, though without doing any material damage, and besides being such things as are frequently though not invariably put up by the landlord and let with buildings of this description, and to all appearance formed part of the building itself, they are therefore very distinguishable from that species of property which seems to have been in the contemplation of the legislature when it passed the enactment in question."

The cases above cited afford, what is most important in practice, a plain and simple rule, easy in application, though, certainly, the reasons adduced by the Chief Judge for his decision in the last-mentioned case, rather impair the simplicity of the rule; for his Honour seems to have considered it doubtful whether there may not be a class of fixtures which do come within the meaning of goods and chattels in the construction of the bankrupt law: the ground of the assumed difference being, whether the articles in question may be removed with much or little injury to the building; which, it is obvious, will be frequently very difficult to ascertain so satis-

<sup>1</sup> 1 Mont. & Ayrton, 494.

factorily as to induce a mortgagee to advance money on such a security. But it is to be lamented that the Court of Chancery has created a still further difficulty, for it seems to have placed the decision of the case in question at a still greater distance from the plain and simple rule adhered to by the courts of common law.

In *Rufford v. Bishop*,<sup>1</sup> the owner in fee simple of certain iron-works in Staffordshire mortgaged the same, together with the steam-engine, furnaces, mills, and other fixtures, and subsequently became bankrupt, having continued in the occupation of the mortgaged premises, and the assignees claimed the fixtures as being in his order and disposition. Sir John Leach, M.R., stated the question to be, "whether the possession of the articles in dispute necessarily inferred that the property in these articles belonged to the trader, so that he might acquire an additional credit from the fact of such possession. The evidence before the Master established that it is the custom in the county of Stafford, when iron-works are let, that articles of this description should be furnished by and continue the property of the lessor. The mere possession of the bankrupt, therefore, did not necessarily infer the property in them, so as to gain him a false credit by the fact of possession." This learned judge, in striving to act up to the spirit of the reputed ownership clause in the Bankrupt Act, seems to us to have overlooked the consideration that it depends entirely upon the law whether the possession of fixtures can give a trader a fictitious credit: for if the law be, that a valid mortgage may be made of fixtures, free from danger of being avoided in case of bankruptcy, it is obvious that the mere possession of them, any more than the possession of a house, cannot confer the privileges of capital. Have not, then, the Courts of Common Law pursued a wiser course in acting upon the plain and undoubted rule, that fixtures are not in their nature "goods and chattels." It is true, they may form part of the personal estate of the owner, but is this sufficient to bring them within the operation of the Bankrupt Act? If so, we must consider leaseholds to be also included. We are glad to observe that *Shadwell, V. C.*, in *Hubbard v.*

<sup>1</sup> 5 Russell, 346.

Bagshaw,<sup>1</sup> took a sounder view of the question, and held that the mere right or power of a tenant to remove fixtures could not affect the legal right of a mortgagee, who was possessed of them as part of the realty.

We now come to the case of *Trappes v. Harter*,<sup>2</sup> which seems to us to have been very much misunderstood. In this case partners, who had erected on real estate, which belonged to the partnership, a manufactory containing valuable machinery and fixtures, mortgaged the real estate and the buildings thereon, comprising in the description of the premises part of the fixtures. The partners having become bankrupt, a question arose between the assignees and the mortgagee as to the right to the fixtures. The judgment of the Court of Exchequer, after time taken to consider, was delivered by Lord Lyndhurst, who stated the case to involve two questions: 1st, whether the fixtures were part of the personal estate of the bankrupts, and 2dly, whether they were comprised in the mortgage-deed. He decided that, under the circumstances of the case, they did constitute part of the personal estate of the partnership, distinct from the real estate; and he then discussed the provisions of the mortgage-deed, and held, that upon the right construction of it, it only comprised part of the fixtures in question, and consequently, that the remainder passed to the assignees as part of the estate of the bankrupts.

We apprehend, his lordship did not mean to determine, that, because the fixtures in question should be considered as personal estate, that therefore they were goods and chattels within the reputed ownership clause in the Bankrupt Act; for if so, the discussion of the second question, whether they were comprised in the mortgage-deed, was wholly irrelevant and unnecessary, for if they were goods and chattels, no deed, however worded, could have protected them from the operation of that clause. It is true, his lordship is reported to have said, "the machinery in this case appears to have been in the reputed ownership of the bankrupts, and they obtained credit by reason of their possession of them, and we are of opinion that

<sup>1</sup> 4 Simons, 326.

<sup>2</sup> 2 Crom. & Mee. 153.

it formed part of the partnership estate, and passed to the assignees as such." But this sentence appears to us to be wholly inconsistent with the remainder of the judgment, and we consider the only and true question in such cases to be, whether the articles be goods and chattels or not. If the decision of the law on this point be, as it undoubtedly is, that they are part of the realty, there is no room for discussion; and the peculiar rights of certain classes of tenants, and whether fixtures can be the means of obtaining credit, are beside the question.

W. C. W.

## DIGEST OF CASES.

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### COMMON LAW.

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[Comprising 5 Barnewall & Adolphus, Part 5; 4 Nevile & Manning, Part 3; 5 Moody & Scott, Part 2; Crompton, Meeson, & Roscoe, Vol. 1, Part 4; and Vol. 2, Part 1; 4 Tyrwhitt, Part 5; and 3 Dowling's Practice Cases, Parts 3 & 4:—all Cases included in former Digests being omitted.]

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ACCORD AND SATISFACTION.—See FRAUDS, STATUTE OF, 2.

#### ACCOUNT STATED.

A. being seised of lands, in trust to pay the net rents to B., received 27*l.* rent, and paid 10*l.* into a bank, with directions for it to be paid to B. on his giving a receipt for 27*l.*: Held, that this was evidence of an acknowledgment of a debt to B., on which B. might maintain an action on an account stated. Held, also, that A. was precluded from showing that at the time of the acknowledgment no balance was in fact due to B.—*Roper v. Holland*, 4 N. & M. 668.

#### ACT OF PARLIAMENT.

1. (*Mode of assessing compensation under local act.*) By a local act, power was given to a company to take lands for the purpose of making a railway, on giving compensation; and it was enacted that if the parties could not agree, a jury should be summoned to assess the value of the land, and to assess compensation for the injury which parties interested in the land would sustain by the execution of the act; which value of the land and compensation they were required to ascertain and settle *separately*. The company wanted land in which a market gardener had a term of years; and a jury summoned under the powers of the act gave a verdict for an *entire sum*, as a satisfaction for all losses and damages, not having been called on by either side to separate their verdict: Held, that the company could not treat this verdict as a nullity, and require a new jury to be summoned.—*In re London and Greenwich Railway Company*, 4 N. & M. 458.
2. (*What is act done in pursuance of—Costs.*) A clause in a local act, appointing commissioners for certain purposes, prohibited them under a penalty from acting or voting where they were personally interested. One of the commissioners being sued for the penalty, the plaintiff was nonsuited: Held, that the action could not be said to be brought for "an act



or thing done under the act," so as to entitle the defendant to treble costs under another clause of the act.—*Charlesworth v. Rudgard*, 3 D. P. C. 517.

### AFFIDAVIT.

1. (*Addition of deponent—Signature.*) "Assessor" is not a sufficient description of a deponent in an affidavit. But if the affidavit be joint, an objection to the description of one of the deponents does not render the statements of the others inadmissible.

It was held to be no objection to an affidavit that it was signed in a foreign character, and that the jurat contained no statement to show that the deponent was a foreigner, and that the writing in question was his signature.—*Nathan v. Cohen*, 3 D. P. C. 370.

2. An affidavit with the word "said" instead of "saith" is insufficient.—*Howorth v. Hubbersty*, 3 D. P. C. 455.
3. (*Erasure or interlineation.*) The alteration of a figure in the date of the jurat, by writing one figure *upon* the other, was held not to constitute either an erasure or an interlineation within the meaning of the rule.—*Jacob v. Hungate*, 3 D. P. C. 456.
4. (*Illiterate deponent—Jurat.*) If an illiterate person is sworn either in Court or before a commissioner, the fact of the affidavit being read over to him, and his understanding it, must be stated in the jurat.—*Haynes v. Powell*, 3 D. P. C. 599.

### AFFIDAVIT TO HOLD TO BAIL.

1. An affidavit for 500*l.* money lent, and interest thereon, and on an account stated, without noticing a contract for interest, held sufficient.—*Pickman v. Collis*, 3 D. P. C. 429. So, though it neither states the amount of the principal, nor the time when the interest began to run.—*White v. Sowerby*, *ib.* 584.
2. An affidavit for goods sold and delivered to, and for money paid and laid out for A., the wife of the defendant, before his marriage with her, held insufficient.—*Gray v. Shepherd*, 3 D. P. C. 442.
3. An affidavit of debt made by a person who described himself as agent and collector to the plaintiff, an hotel keeper, was held sufficient.—*Short v. Campbell*, 3 D. P. C. 487.
4. An affidavit of debt, defective as to part, is defective as to the whole.—(1 D. P. C. 318, 631.)—*Raggett v. Guy*, 3 D. P. C. 554.

### AGREEMENT.

- (*Construction of.*) Assumpsit on an agreement, whereby the defendant agreed to sell, and the plaintiff to buy, "all the naphtha which the defendant might make from the 1st June next, during the term of two years, say from 1000 to 1200 gallons per month, at the rate of 2*s.* 6*d.* per gallon," &c.; and it was agreed, that should the plaintiff be desirous of dissolving the said contract before the expiration of the said term, he should be at liberty to do so on giving the defendant three months' notice. The de-

claration averred, that the quantities of naphtha which the defendant ought to have made during a period of ten months, under the agreement, at the rate of from 1000 to 1200 gallons per month, and to have sold and delivered to the plaintiff, amounted to a much larger quantity than he had sold and delivered, viz. 7000 gallons more; yet that the defendant had not sold and delivered the same to him: Held, on demurrer, that the declaration could not be supported.—*Gwillim v. Daniel*, 2 C., M. & R. 61.

### ARBITRATION.

1. (*Of matters in difference—Finality of award.*) In an action for work and labour, money paid, &c. against two partners, all matters in difference in the cause between the parties were referred to a legal arbitrator. In the particulars of demand in the action, and before the arbitrator, credit was claimed by the plaintiff for the amount of certain cheques given to one of the defendants. The arbitrator awarded a certain sum to the plaintiff, but specially stated in the award, that the cheques, or the money paid in respect thereof, were claimed as matters in difference in the cause, and declared and determined that they were *not* matters in difference in the cause: Held, that the award was not final, and was therefore void.—*Samuel v. Cooper*, 4 N. & M. 520.
2. (*Arbitrator's authority.*) If a cause be referred to a barrister, though with a power to *certify* only, his certificate cannot be impeached on the ground that he has mistaken the law. If the arbitrator desires the opinion of the Court on the law, he may state the facts for that purpose.—*Wilson v. King*, 4 Tyr. 998.
3. (*Finality of award—Costs.*) In two actions, one on the case for disturbance of common, by inclosing a part, and the other in trespass *qu. cl. fr.*, a verdict was taken generally for the plaintiff, subject to a reference by order of *nisi prius* of those causes, and of another action of trespass not then at issue, as well as of all antecedent causes of action between the parties. H., a person as whose servant the defendants had justified in some of the pleas, and who was not a party to either cause, was to be at liberty to become a party to the reference, as was also any other person claiming rights of common over the *locus in quo*; the object of the reference being declared to be, that the rights of the commoners should be ascertained, secured, and regulated as concerned the parties thereto. In one action of trespass not guilty was pleaded, and a great number of issues were joined, claiming various rights of common. In the other, not guilty, and numerous special pleas of justification, had been pleaded, though no issues were yet joined. The arbitrator awarded for the plaintiff in the action for disturbance of common. In the action of trespass which was at issue, he awarded that the defendants were not guilty; and in that which was not at issue, that the plaintiff had no cause of action. He did not further notice the other issues, nor specify any mode of terminating either cause; but proceeded, in pursuance of the terms of the order of reference, to declare the rights of the parties in the cause to enjoy the common, and inclose certain woods in future. He then directed the party who was

defendant in the first action, and plaintiff in the two others, to pay all the costs of the reference and award: Held, first, that the award was final, and substantially disposed of all questions between the parties; secondly, that as the arbitrator had not been desired to decide on each issue separately, or on those in particular which justified under title in H., who had not become a party to the reference, he was not bound to find any thing respecting H.; and that the officer of the Court might make up the roll as if the causes had been tried by a jury who had been discharged from trying the special issues.

The costs of the causes referred were to abide the event of them: Held, that the costs of the pleadings in the cause which was not at issue, and in which the arbitrator found that the plaintiff had no right of action, followed the event as in case of a nonsuit.—*Dibben v. Marquess of Anglesea*, 4 Tyrw. 926.

4. (*Setting aside award.*) A rule for setting aside an award must appear, on the face of it, to be drawn up on reading the award itself, or a copy of it; and the Court will not allow it to be amended.

Where, however, such a rule was drawn up on imperfect materials, and was therefore discharged, the Court, under special circumstances, allowed a new rule.

In K. B., the Court may look at the record on discussing a motion for a new trial, although the rule is not drawn up on reading it: so, therefore, the Court may look at the record on an application to set aside an award made pursuant to an order of *nisi prius*, though the rule is not drawn up on reading it.

If it clearly appear, on reading an award, that the arbitrator intended to leave a particular question of law open, the Court will entertain it, although in terms the arbitrator may in one part of his award have determined it.—*Sherry v. Oke*, 3 D. P. C. 349.

5. (*Enlargement of time for award.*) Where the time for making an award is enlarged by the arbitrator without strictly complying with the directions of the order of reference, but the time is subsequently again regularly enlarged with the consent of the parties, no objection can be made to the award on the ground of the first irregular enlargement of time.—*Benwell v. Hinrman*, 3 D. P. C. 500.

6. (*Attachment.*) Where an award found that a balance of 17*l.* was due from the plaintiffs to the defendant, but contained no order on the plaintiff to pay the money, the Court refused to grant an attachment for non-performance of the award. (3 Bing. 634.)—*Scott v. Williams*, 3 D. P. C. 508.

7. (*Costs.*) Where an arbitrator to whom a cause was referred by order of *nisi prius*, took no notice in his award of a power given him by the order to give the defendant his costs on the ground of an excessive arrest, but did dispose of the general costs of the cause, the Court refused to interfere to give the defendant his costs.—*Greenwood v. Johnson*, 3 D. P. C. 606:

And see Costs, 1; LIEN; PARTNERSHIP.

## ARREST.

1. (*Privilege from.*) Where a party arrested while privileged from arrest has paid money into Court, by permission of a judge, to obtain his discharge, he is entitled, upon application to the Court, to have the money restored to him.—*Pitt v. Coombs*, 4 N. & M. 535.
2. (*After giving time.*) A defendant is not entitled to be discharged out of custody on the ground that the plaintiff arrested him after he had consented to give him time to pay the debt, which had not elapsed.—*Udall v. Nelson*, 4 N. & M. 637.
3. (*Exemption from.*) One of the king's chaplains having been arrested and given bail, the Court, on motion, ordered the bail-bond to be delivered up to be cancelled.—*Byrn v. Dibdin*, 3 D. P. C. 448.
4. (*Same.*) A lord of the bed-chamber is privileged from arrest.—*Aldridge v. Barry*, 3 D. P. C. 450.
5. (*Second arrest.*) A defendant having been arrested, the plaintiff, on the ground of some irregularity, discontinued the action and paid the costs. He again arrested the defendant by leave of a judge, and the sheriff, not having had notice of the discontinuance of the first action, detained the defendant for some time on both writs; but it appeared that the defendant had in fact suffered no inconvenience, as, before he tendered bail on the second writ, the sheriff had notice of the discontinuance. The Court, under these circumstances, refused to order the bail-bond to be cancelled.—*Price v. Day*, 3 D. P. C. 463.
6. *Semble*, that to constitute an arrest, the warrant must be produced: and the closest watching is not sufficient.—*Robins v. Hender*, 3 D. P. C. 543.
7. A plaintiff may, without discontinuing, arrest a defendant for a cause of action, though he has proceeded, in an action for the same cause commenced by serviceable process, so far as to set it down for trial. (3 D. P. C. 313.)—*Brickline v. Smallwood*, 3 D. P. C. 569.

## ASSUMPSIT.

- (*Consideration.*) Where a declaration in *assumpsit* states several matters as a consideration for the defendant's promise, though all be not good, yet if a sufficient consideration remains, it is enough to support the promise laid in the declaration.

It is only in cases of *executed* considerations that it is necessary to state that the consideration for the defendant's promise moved at the defendant's special instance and request.—*King v. Sears*, 2 C., M. & R. 48.

## ATTORNEY.

1. (*Striking off the roll.*) The Court of K. B. will not grant a rule calling on an attorney to show cause why he should not be struck off the roll, if the affidavits impute an indictable offence.—*In the matter of* —, 5 B. & Ad. 1088.
2. (*Summary jurisdiction over.*) Where an attorney had obtained from an aged lady, in her attorney's absence, her signature to a paper whereby she agreed to abandon a judgment in ejectment obtained by her on the de-

fault of the tenant in possession, and to allow the question of title to be fairly tried as between her and the landlord (the attorney's client), the Court, on motion, compelled him to deliver up the paper to be cancelled.—*In re Oliver*, 4 N. & M. 471.

3. (*Obligation upon, to deliver up deeds, &c. to client.*) Where a rule nisi calling on an attorney to show cause why he should not deliver up deeds, &c. to his client, has been obtained and enlarged, he may show for cause that in the intervening vacation he was, by an order of the Court of Chancery, required to deliver the same deeds, &c. into the hands of an officer of that Court, on a day earlier than that on which such cause is shown.—And this was held a sufficient answer to the application.

An attorney cannot retain against an executor and devisee in trust, deeds, &c. delivered to him by the testator as his attorney, on the ground of an equitable interest under the trusts personally vested in him, the attorney.—*In re Walmsley*, 4 N. & M. 543.

4. (*Striking off the roll.—Practising by unqualified person.*) A superior Court is bound, on summary application under the 22 G. 2, c. 46, s. 11, to strike an attorney off the roll who is shown to have allowed an unqualified person to practise in his name. But that Court only from which the abused process issued can act upon such an application; and that only on the ground of the jurisdiction given by the statute, not on the ground of a general jurisdiction of the Court over its officers. (3 D. & R. 260; 2 Bingh. 74.)—*In re Palmer*, 4 N. & M. 529.
5. (*Taxation of bill.—Stay of proceedings.*) A summons to refer an attorney's bill for taxation, and a judge's order thereupon, do not operate as a stay of proceedings, so as to prevent the attorney from suing on the bill.—*Williams v. Roberts*, 1 C., M. & R. 676.
6. (*Privilege of.*) Trespass is not maintainable by an attorney for holding him to bail, notwithstanding his privilege.—*Noel v. Isaac*, 1 C., M. & R. 753.
7. (*Entry in Master's book.*) Where an attorney, through the negligence of his clerk, had omitted to make the entry required by the 37 G. 3, c. 90, s. 27, in due time, the Court allowed that entry to be made *nunc pro tunc*, he having regularly taken out his certificate and paid the duty.—*Exp. Fry*, 3 D. P. C. 338. But it will not be allowed after an action for the penalty has been commenced.—*Exp. Swift*, *Ibid.* 636.
8. (*Readmission.*) If an attorney practises after the expiration of his certificate, even though with the hope of taking it out, he cannot be re-admitted without payment of the arrears of duty for the years during which he so practised, and something more than a nominal fine.—*Exp. Philpott*, 3 D. P. C. 339.
9. (*Admission.—Affidavit of service under articles.*)—Where a clerk was articulated to a second master pursuant to the 22 G. 2, c. 46, s. 9, and the affidavit of such articles was not filed within three months after their execution, as required by s. 3, of that statute, he was held incapable of being ad-

- mitted; nor could the affidavit be filed *nunc pro tunc*.—*Exp. Joy*, 3 D. P. C. 342.
10. (*Striking off the roll*.) It was held to be no ground for striking an attorney off the roll, that he had brought several *qui tam* actions for large penalties, and made offers to compromise them.—*Smith v. Gillett*, 3 D. P. C. 364.
  11. (*Re-admission*.) An attorney cannot be re-admitted without an affidavit that he has given notice to the Stamp Office of his intention to apply for re-admission.—*Exp. Bridgman*, 3 D. P. C. 371.
  12. (*Practising in name of London agent*.) An attorney may have his costs of conducting a cause, although, not being on the roll of attorneys of the Court in which it was brought, he conducted the proceedings in the name of his London agent.—*Goodner v. Cover*, 3 D. P. C. 424.
  13. (*Liability of, for giving false residence of client*.) An attorney who gives a false residence of his client, without using proper means to ascertain its correctness, subjects himself to the costs which may be incurred by moving for an attachment against him: but he is not liable to pay the costs of the action if he is *bonâ fide* unable, after proper inquiry, to give his client's residence.—*Neal v. Holden*, 3 D. P. C. 493.
  14. (*Action on bill—Taxation—Pleading*.) In an action on an attorney's bill, the defendant's attorney suffered judgment to go by default, which was set aside on payment of costs and an affidavit of merits. The defendant then pleaded that no signed bill had been delivered, and afterwards added two other pleas, *non-assumpsit*, and that the plaintiff had not taken out his certificate. The plaintiff obtained a judge's order confining the defendant to the plea of the general issue. The Court held this order right, it appearing that the defendant had had the bill taxed.—*Biggs v. Maxwell*, 3 D. P. C. 497.
  15. (*Changing attorney*.) If the attorney on the record is changed without an order, but the opposite party treats the new attorney as the attorney in the cause, he cannot afterwards object that no order was obtained.—*Farley v. Hebbes*, 3 D. P. C. 538.
  16. A motion to compel an attorney to answer the matters in an affidavit cannot be made on the last day of term.—*In re Turner*, 3 D. P. C. 557.
  17. (*Inrolment of indenture of clerkship*.) If the original indenture of clerkship is lost, a copy may be inrolled.—*Exp. Chapman*, 3 D. P. C. 562.
  18. (*Re-admission*.) If the agent of an attorney neglects to take out the attorney's certificate, and he continues, in ignorance of such neglect, to practise, he may be admitted on payment of a nominal fine, and the arrears of duty. (1 B. & Ald. 592.)—*Exp. Thorpe*, 3 D. P. C. 592.
  19. (*Summary application against*.) On an application against an attorney for an attachment for contempt of a Rule of Court, the Court will take judicial notice of his being on the roll. (3 D. P. C. 41.)—*Exp. Hore*, 3 D. P. C. 600.
  20. (*Lien of*.) Rule 93, H. T. 2 W. 4, gives the attorney a lien on a judg-

ment obtained by him, for his costs *as between attorney and client*.—*Watson v. Mascall*, 3 D. P. C. 638.

21. (*Summary jurisdiction over*.) The directing an attorney to employ a proctor to obtain probate of a will, is not such an employment of the attorney as will give the Court summary jurisdiction over him, as to money received by him to pay the proctor.—*Exp. Cowie*, 3 D. P. C. 600.

AUCTION. See VENDOR AND PURCHASER.

## BAIL.

1. (*Staying proceedings on bail-bond.—Declaring de bene esse*.) On an application by the bail to stay proceedings on the bail-bond on payment of costs, the affidavit stated that the application was made "at their own expense, and for their own indemnity." Held irregular, for not complying with the rule of 59 G. 3. That rule is now in force in the Exchequer as well as the K. B. (Overruling *Bourke v. Bourne*, 2 D. P. C. 250.)

The plaintiff is not entitled to insist on the bail-bond standing as a security, where, the defendant not being in custody, the plaintiff has not declared *de bene esse*.—*Call v. Thelwell*, 1 C., M. & R. 780; 3 D. P. C. 443.

2. (*Notice of bail in the Exchequer*.) A notice of bail in the Exchequer, signed by an attorney who was not an attorney of that Court, but had liberty to practise there in the name of another, thus,—“A. B. by C. D.” was held irregular: the signature should have been in the name of the attorney in the Exchequer only.—*Chadwick v. Hough*, 2 C., M. & R. 29.
3. (*Affidavit of sufficiency—Costs*.) Where an affidavit of sufficiency omits to state the place where the property is situate, and only ascribes the value to several kinds of property collectively, it is a departure from the form given by the rule, (3 T. T. 1 W. 4,) and if the bail justify, the defendant is not entitled to the costs of justification. (1 D. P. C. 368).—*Hodgson v. Cooper*, 2 C., M. & R. 44.
4. (*Putting in special bail*.) Rule 14 of H. T. 2 W. 4, has been virtually abrogated by 2 W. 4, c. 39, s. 16. The expression “putting in special bail,” in that section, means the putting in of special bail, and giving notice thereof.—*Grant v. Gibbs*, 3 D. P. C. 409.
5. (*Notice of justification.—Prisoner*.) A two days' notice of justification by a prisoner, accompanied by an affidavit, according to the rule of Trinity Term, 1 W. 4, must express that he is a prisoner. (1 D. P. C. 609).—*Bullen's bail*, 3 D. P. C. 422.
6. (*Affidavit of justification*.) The affidavit of justification stated that the bail was a housekeeper at S., but did not say that he *resided* there. This was held such a deviation from the form given by the rule of T. T. 1 W. 4, as to deprive the defendant of the costs of justification.—*Heald's bail*, 3 D. P. C. 423.
7. (*Waiver of irregularity in notice of exception—Notice of justification.—Costs*.) The want of entry in the book of exception is waived by giving notice of justification. A notice of justification which stated that the bail

had resided for the last six months "at the parish of W." (it appearing from the notice that W. was a town having several streets,) was held insufficient. But the costs of opposition were refused.—*Hanwell's bail*, 3 D. P. C. 425.

8. (*Affidavit of justification.—Amendment.*) The affidavit of justification, which stated the bail to be "possessed," instead of "worth," &c. was not allowed to be amended. (2 D. P. C. 53.)—*Naylor's bail*, 3 D. P. C. 452.
9. (*Deposit in lieu of.*) If a defendant, instead of putting in bail, deposits the amount of the debt, with 10*l.* for costs, pursuant to the 43 G. 3, c. 46, s. 2, he need not pay in the additional 10*l.* pursuant to the 7 & 8 G. 4, c. 71, s. 2, until the last day allowed for perfecting special bail. (6 Bing. 634; 2 B. & Ad. 422.)—*Straford v. Love*, 3 D. P. C. 593.
10. (*Same.*) If a defendant has deposited money in lieu of bail, which the sheriff pays into Court, the defendant is entitled to take it out on justifying bail in due time. And if the affidavit on which such a motion is made states that bail has been justified, this Court will presume it to have been done in due time, unless the plaintiff shows the contrary.—*Young v. Maltby*, 3 D. P. C. 604.

And see HABEAS CORPUS, 1, 2.

#### BANKER.

(*Liability of, to customer.*) The plaintiff, a customer of the Bank of England, was in the habit of making his acceptances payable there. One of them was presented at eleven in the morning, and dishonoured for want of assets. At six in the evening of the same day it was presented again by a notary, when the same answer was given by a person stationed for that purpose. It was proved not to be the custom for the Bank to pay bills after the hours of business (five o'clock): Held, that the Bank, though they had received assets before six o'clock, were not bound then to pay the bill. But *semble*, it was their duty to have informed the notary that they had received assets, and that the bill would be paid the next day. (7 East, 385; 1 M. & S. 28; 2 Chit. R. 125; 6 M. & S. 44.)—*Whitaker v. Bank of England*, 1 C., M. & R. 744.

#### BANKRUPTCY.

1. (*Damages in trover by assignees.*) In trover by assignees against the sheriff for goods seized and sold by him after an act of bankruptcy, the jury may deduct, in their estimate of the damages, the expenses of the sale.—*Clarke v. Nicholson*, 1 C., M. & R. 724; 3 D. P. C. 454.
2. (*Act of bankruptcy.*) An assignment by deed of all a trader's property in trust for the benefit of his creditors, is an act of bankruptcy under 6 G. 4, c. 16, s. 3, although in so doing he do not intend to defeat or delay his creditors: for that being the necessary consequence of the assignment, he must in law be taken to have intended it. (9 East, 487.)—*Stewart v. Moody*, 1 C., M. & R. 777.
3. (*Transfer of goods—Act of bankruptcy.*) Trover by assignees of a bankrupt for certain goods, &c. in the bankrupt's possession as his property at



the time of the bankruptcy, and converted by the defendants since the bankruptcy. Plea, that before the bankruptcy the bankrupt assigned and conveyed the goods to the defendant by deed, and that before the bankruptcy the defendant took possession thereof, and kept and retained such possession. Replication, that the defendants did not take possession of the goods before the bankruptcy; whereon issue was joined, and a verdict found for the plaintiffs: Held, that the issue was an immaterial one; since the assignment, being a transfer of personal property, was sufficient of itself to convey it, without possession, the want of which only amounted to evidence of fraud.

*Quare*, Whether the payment of a country bank note to a creditor, with the intention of giving him a fraudulent preference, is an act of bankruptcy within the 6 G. 4, c. 16, s. 3. (6 Bing. 363; 2 B. & Ald. 327.)—*Carr v. Burdiss*, 1 C., M. & R. 782.

And see LIEN.

### BILL OF EXCHANGE.

1. (*Notice of dishonour.*) Notice of dishonour of bill is sufficient if given by any one who is a party to the bill, and need not proceed either immediately or derivatively from the *holder*. (4 Campb. 87; 2 Campb. 373; 1 Stark. N. P. C. 34; 1 T. R. 167; 7 Ves. jun. 597; 2 Campb. 177, *contrà*.)—*Chapman v. Keane*, 4 N. & M. 607.
2. (*Same.*) In an action by indorsee against acceptor, evidence was given of a conversation between the defendant and A., in which the defendant stated, as one of several defences he had to the action, that the plaintiff "had not sent the letter to him in time." This having been left to the jury (after objection,) as evidence of due notice of dishonour, and a verdict having been found for the plaintiff: Held, (Lord Denman dissenting,) that the jury were not warranted in presuming that *due* notice had been given.—*Braithwaite v. Coleman*, 4 N. & M. 654.
3. (*Same.*) If a notice of dishonour is sent by post on the day on which the defendant ought to receive it, the onus is on the plaintiff to show that the letter was put in in time to reach the defendant on that day, according to the course of the post. (2 Campb. 208.)—*Fowler v. Hendon*, 4 Tyrw. 1002.
4. (*Alteration of.*) A bill drawn and accepted for value, was altered by the drawer, and thereby vitiated: Held, that the drawer, after the day of payment had passed, might, on the dishonour of the bill, sue the acceptor on the original consideration.—*Atkinson v. Hawdon*, 2 C., M. & R. 409.
5. (*Plea of want of consideration.*) Indorsee v. Acceptor. Plea, that there was not at any time any consideration for the defendant's accepting or paying the bill, or any part thereof: Held bad on special demurrer. (5 Moo. & Sc. 97.)—*Reynolds v. Ivimey*, 3 D. P. C. 453.

And see PLEADING, 3, 8; PROMISSORY NOTE.

BOND. See PLEADING, 5.

**BRIBERY.**

A person who makes a *corrupt agreement* with a voter to vote for a particular candidate at an election for members of parliament, and gives the voter money, &c. in performance of his part of the agreement, is liable to the penalty imposed by the Bribery Act, 2 G. 2, c. 24, s. 7, for *corrupting* the voter, although the voter afterwards votes for a different candidate, and although he intended to do so at the time of making the corrupt agreement. (3 Burr. 1235.)—*Henslow v. Fawcett*, 4 N. & M. 585.

**BRIDGE.**

(*What is a county bridge.*) Though there cannot be a bridge which the county is bound to repair, where there is no *cursus aquæ*, yet it is a question of fact in each case whether an *arch* thrown over a *cursus aquæ* is such a bridge or not; and the fact of the arch having no *parapets* will not of itself prevent its being a county bridge.—*The King v. Inhabitants of Whitney*, 4 N. & M. 594.

**BUILDING ACT.**

1. (*Evidence under general issue given by.*) In trespass for building on and heightening the plaintiff's wall, and thereby obstructing his light, the defendant pleaded the general issue. The defendant proved that the wall was a party-wall, and that he had acted under a *bonâ fide* impression that the provisions of the Building Act, 14 G. 3, c. 78, s. 43, justified him in raising the wall. The plaintiff was thereupon nonsuited, not having given a notice of action as required by s. 100 of the act: Held, that the evidence was properly received under the general issue, and that the nonsuit was right.—*Wells v. Ody*, 2 C., M. & R. 128.

2. (*Liability under, as owner of improved rent.*) An administrator, who as such receives the improved rent of a house in London from the tenant in possession, is liable, under s. 41 of the Building Act, 14 G. 3, c. 78, to be sued for the moiety, or other proportionate part of the expense of building a party-wall erected by the owner of the adjoining house, in pursuance of the act.—*Thacker v. Wilson*, 4 N. & M. 658.

**CANAL ACT.**

(*Construction of—Action for consequential damages.*) By a canal act, 30 G. 3, c. 82, s. 7, the owners of certain works called the Pentryrch works, were entitled to all the surplus water, or such as was not wanted for the purposes of the canal. By a subsequent act, 36 G. 3, c. 69, the canal company were required to finish the canal and all the works and extension of the same, within the space of two years, and were restricted from making any alterations in the canal after the expiration of that time. After the expiration of the two years the canal company erected an engine for the purpose of forcing water into the canal, by which the quantity of water was increased, and the company were enabled to pass down a greater number of barges than could have been passed down before the erection of this engine. Held, that this having had the effect of diminishing the quantity of surplus water, in consequence of the increased trade, was an

injury to the owners of the Pentyrch works, for which they were entitled to recover consequential damages.

The 30 G. 3 also provided, for the purpose of better securing the surplus water for the benefit of the Pentyrch works, that the lock should be made below and nearest to the Pentyrch works, should always be kept in good and sufficient repair by the canal company, for the purpose of preventing leakage or waste of water, &c. The canal company constructed a *notch* for the purpose of conveying water below the lock directed to be kept in repair: Held, (Parke, B. *dubitante*,) that the company had no right to pass any water below the lock, though necessary to the lower part of the canal, except that which necessarily passed by barges being lowered through the lock, and that the notch was not authorized by the act of parliament.—*Blakemore v. Glamorganshire Canal Company*, 2 C., M. & R. 133.

And see POOR RATE, 1.

#### CHARTER.

(*Grant of forfeitures by*.) Edward IV. granted by charter to the corporation of Dover "all penalties forfeited and to be forfeited, &c. of all and every the barons, &c. in whatsoever Courts the same barons, &c. should be adjudged to make such forfeitures." Charles II. also granted by charter to the corporation "all fines, *forfeitures*, &c. in the Courts aforesaid arising:" Held, that under neither of these statutes did a forfeited recognizance to appear to answer a charge of misdemeanor, estreated into the Exchequer, pass to the corporation. (*Rex v. Mayor of London*, 1 C., M. & R. 1; *Cowell's Interp. voce Forfeiture*; *Ducange, voce Forisfactura*.)—*Rex v. Mayor of Dover*, 1 C., M. & R. 726.

#### COGNOVIT.

(*Given by prisoner—Naming attorney*.) A defendant in custody being about to execute a cognovit, and his attorney being absent from home, the plaintiff's attorney mentioned the name of another attorney who might act for him; the defendant made no objection, but went to his office; and being asked by that attorney, "Do you wish me to act as your attorney to attest the execution," he answered "Yes:" Held, that the rule 72, H. 2 W. 4, was fully complied with. (4 B. & Ad. 371; 2 C. & M. 215.)—*Bligh v. Brewer*, 1 C., M. & R. 651.

#### COMMON.

(*Rights of common over woods—Inclosure by lord*.) A manor, with certain lands and woods over which common was claimed, had been from time immemorial part of Cranbourne Chase. In 17 Eliz., the lord, being owner of certain coppices and woods in the manor, granted several leases for 1000 years, of messuages and lands, with common of pasture as appurtenant thereto, for beasts, over such coppices and woods, in the manner then accustomed by others having like common. The right of common then accustomed was from 12th May to 22d November, except in those parts of the woods wherein the owner from time to time cut down the wood or underwood at his pleasure, and which he was accustomed to inclose with a

fence, to preserve the young growth, excluding the deer of the chase for three years, and all commonable cattle for four years, after such cutting. In an action for disturbance of the right of common of these grantees, the question was, whether the owner of the woods could legally inclose any part of them, where the wood had been cut down, so as to keep out all commonable cattle for *seven* years afterwards: Held, that he could not: for that the stat. 22 Edw. 4, c. 7, does not apply to woods wherein rights of common exist; and the 35 Hen. 8, c. 17, s. 8, extends only to woods in which there exists *immemorial* rights of common.—*Dibben v. Marquess of Anglesea*, 4 Tytw. 926.

COMPENSATION. See ACT OF PARLIAMENT.

### CONVICTION.

(*Sufficiency of, to support commitment.*) In trespass for false imprisonment against two magistrates, the defendants gave in evidence a conviction of the plaintiff under 7 & 8 Geo. 4, c. 30, s. 24, for "unlawfully and maliciously damaging," &c., a quantity of rushes, for which they adjudged him to pay the sum of 10s. as a *reasonable compensation*, and 6s. for costs; and in default of immediate payment to be imprisoned for *one calendar month, unless such sums were sooner paid*. The warrant of commitment stated the offence to be that the plaintiff *unlawfully trespassed on land* in the occupation of T., and cut down and carried away a quantity of rushes, for which offence he was ordered to pay the sum of 10s. *penalty*; and the gaoler was ordered to detain him for the space of *one month, or until he should be delivered by due order of law*: Held, that the conviction sufficiently supported the commitment. (7 & 8 G. 4, c. 30, s. 39.)—*Daniell v. Philipps*, 1 C., M. & R. 662.

### COPYRIGHT.

(*Of engraver.*) No copyright vests in the engraver of a print under 17 Geo. 3, c. 57, unless the date of the first publication thereof be engraved thereon. It is therefore a good plea to an action on the case for pirating such print, that the plaintiff has not the sole right of printing, &c., by reason that no date is engraved on the print. (4 Bingh. 234.)—*Brookes v. Cock*, 4 N. & M. 652.

### COSTS.

1. (*Under 43 G. 3, c. 46.*) The Court has no power under this statute to award costs to the defendant, except where the plaintiff has recovered by *judgment* only, a less amount than he arrested the defendant for. Where, therefore, the recovery was by an award, on a reference before issue joined, although it was expressly stipulated in the submission that the costs of the cause and of the reference should abide the event of the suit, *in like manner as upon a verdict*: the Court held that they had no jurisdiction under the act. And *semble*, even if the parties had agreed that judgment should be entered up for the amount awarded, for the purpose of reserving the jurisdiction of the Court under the act, the Court would not accept such jurisdiction. (3 B. & C. 491.)—*Holder v. Raith*, 4 N. & M. 467.

2. (*Security for costs—Bankruptcy.*) Where a plaintiff becomes bankrupt before the trial of a cause, the defendant cannot apply for security for costs, till he has ascertained that the assignees have determined to proceed with the action.

A plaintiff declared in time to go to trial "at the sittings in Michaelmas term," had not two orders for time to plead been obtained. The "usual terms" being imposed, (*inter alia*, the accepting short notice of trial,) the plaintiff might still have gone to trial at the sittings after that term, but did not. On the 10th January, he was gazetted a bankrupt. On the 29th the issue was delivered: Held, that an application for security for costs, made on the 31st January, was in time.—*Walkinshaw v. Marshall*, 4 Tyrw. 993.

3. (*Certificate under rule of H. T. 4 W. 4.*) Under the directions to taxing officers promulgated in H. T. 4 W. 4, it is not necessary for the judge who certifies to enable a plaintiff to obtain full costs, to hear the cause throughout.—*Nokes v. Frazer*, 3 D. P. C. 339.
4. (*Costs of first trial.*) Where the judge, of his own authority, discharges the jury from giving a verdict, on the ground of their not being able to agree, the party ultimately successful will not be entitled to the costs of the first attempt at trial. (2 D. P. C. 118; 1 D. P. C. 627; 5 Burr. 2693; 3 T. R. 657.)—*Seely v. Powers*, 3 D. P. C. 372.
5. (*Under 43 G. 3, c. 46.*) A defendant was arrested on a writ, in which the sum of 37*l.* was by mistake inserted as the amount for which bail was to be taken; but on the back of the writ the plaintiff demanded 27*l.* only, which was the sum really claimed. The officer was acquainted with the mistake, and directed to arrest for the smaller sum only. The defendant was arrested for that sum, and sent to prison. At the trial the plaintiff made out a claim to the extent of 28*l.*, but there being no count in the declaration adapted to a portion of the demand, he agreed to forego that portion; and take a verdict for 20*l.* only: The Court, under these circumstances, refused to allow the defendant his costs under the 43 Geo. 3, c. 46, s. 3.—*Preedy v. Macfarlane*, 3 D. P. C. 458.
6. (*Of witnesses.*) A master of a vessel detained here as a necessary witness, was allowed, on taxation of costs, the expenses of his living here and his travelling expenses, and disallowed a claim for wages, which, if he had sailed, he would have been entitled to: Held, that the taxation was proper.—*White v. Brazier*, 3 D. P. C. 499.
7. (*On postponement of trial.*) Where a cause standing in the paper is postponed at the plaintiff's instance, on payment of costs, the defendant is entitled to no more costs than he would if the record had been withdrawn.—*Walker v. Lane*, 3 D. P. C. 504.
8. (*Attachment.*) An attachment cannot be obtained for non-payment of costs pursuant to the Master's *allocatur*, if there was no undertaking, in the judge's order for taxation, to pay what should be found due.—*Harrison v. Ward*, 3 D. P. C. 541.

9. (*Security for costs.*) If a plaintiff be permanently resident abroad, and is only occasionally in this country, he is liable to give security for costs. And obtaining an order for time to plead does not preclude a defendant from obtaining such security.—*Gurney v. Key*, 3 D. P. C. 559.
10. (*Same.*) A rule *nisi* for security for costs cannot be obtained with a stay of proceedings, on the last day of term.—*Gronow v. Pointer*, 3 D. P. C. 571.
11. (*Same.*) The Court refused a rule calling on a defendant in replevin to give security for costs on account of poverty and insolvency.—*Hiskett v. Biddle*, 3 D. P. C. 634.
12. (*Attachment—Personal service.*) Personal service of the rule for payment of costs is necessary in order to obtain an attachment, although the defendant is an attorney. (2 D. P. C. 673.)—*Albin v. Toomer*, 3 D. P. C. 563. But it is not indispensably necessary that the rule and *allocatur* should be left on the *person* of the defendant.—*Rex v. Koops*, 3 D. P. C. 566.
13. (*Same.*) To obtain an attachment, it is not sufficient that all the necessary steps are taken, partly at one time and partly at another.—*Rogers v. Twissel*, 3 D. P. C. 572.
14. (*Same.*) To obtain an attachment, a demand is not necessary, if the party sought to be served, by his violence, prevents the service from being made.—*Wenham v. Downes*, 3 D. P. C. 573.
15. (*Same.*) If it is clear that the rule and *allocatur* have come to the defendant's hands, the Court will grant a rule *nisi* for an attachment, although strict personal service has not been effected.—*Phillips v. Hutchinson*, 3 D. P. C. 583.
16. (*Same.*) An attachment for non-payment of costs was granted on the 22d April, though the affidavit did not show any demand made since the 2d February.—*Rex v. Rogers*, 3 D. P. C. 605.
17. (*Same.*) A rule for an attachment for non-payment of costs, on taxation between attorney and client, is *nisi* only in the first instance.—*Green v. Light*, 3 D. P. C. 578.
18. (*By whom to be demanded.*) Where a rule of Court directs costs to be paid to the party or his attorney, a demand not made by the attorney who had conducted the cause in London, but by the attorney in the country, who employed him, is sufficient.—*Dennett v. Pass*, 3 D. P. C. 632.

And see ARBITRATION, 3, 7; COURT OF REQUESTS; EXECUTOR AND ADMINISTRATOR.

#### COURT OF REQUESTS.

1. In an affidavit to ground a motion for depriving a plaintiff of costs, on the ground that the subject-matter of the action was cognizable in a court of requests, it is not sufficient to state that the defendant *resides* within the jurisdiction of such court; it must be stated that he *resided* within it at the

time of action brought. (1 Taunt. 60.)—*Moreau v. Hicks*, 4 N. & M. 563.

2. The London Court of Requests Acts give jurisdiction over liquidated demands, though there are special counts; but not in cases where unliquidated damages are sought to be recovered; as on a count for not returning goods unsold. (5 T. R. 529.)—*Postan v. Masser*, 4 Tyrw. 999.

#### COVENANT.

(*Assignment of breaches*.) A. and B., lessees of a coal mine, A. being also lessee in trust for himself and B., of adjoining land, necessary for the working of the mine, covenanted with C. that he would do nothing whereby an annuity, charged upon the profits which, after payment of rent, taxes, &c., then charged thereon, might be made under the leases of the mine and land, by the sale of the coal or otherwise, (with power of entry on the mine, &c., and sale, in case the annuity should be in arrear,) might be impeached. In an action on the covenant, C. assigned as breaches, first, that A. surrendered the land, and took a new lease to himself and B. jointly, in trust for other persons, whereby the annuity became and was impeached, and the plaintiff lost his remedy to enforce it; secondly, that A. and B. accepted a new lease of the land at an increased rent, and in other respects on less advantageous terms, for the fraudulent purpose of obtaining from the lessor a demise of mines under the land on terms advantageous to A. and B., whereby the annuity became and was impeached; thirdly, that A. and B. assigned such last-demised mines and the land to D., whereby the annuity became and was impeached: Held, that the declaration was insufficient, for not showing in what manner the acts complained of operated to impeach the annuity. Held, also, that it was not ground of demurrer that the declaration omitted to allege that any profits had been made on the mine, although such allegation would have been necessary in an action to recover arrears of the annuity.—*Pitt v. Williams*, 4 N. & M. 412.

And see LEASE.

#### CUSTOM.

(*Exclusive privilege of town-crier*.) A custom that the town-crier of a corporate town shall have the exclusive privilege of proclaiming, by the sound of the bell, the sale of all goods brought into the borough to be sold by auction, is good in law. (Willes, 666; 1 Doug. 132; 1 Ventr. 21, 195; 1 Str. 462; 4 B. & A. 438; Bac. Abr. Offices (A.).)—*Jones v. Waters*, 1 C., M. & R. 713.

#### DETINUE.

1. (*Pleading in*.) In detinue, a plea that the plaintiff did not deliver the goods to the defendant, is bad on general demurrer. (1 Tyrw. 445; Willes, 118.)—*Walker v. Jones*, 4 Tyrw. 915.
2. (*Staying proceedings in*.) In an action of detinue for deeds, the Court will, on delivering up of a portion of them, either stay proceedings, or put the

plaintiff under terms, if he insists on proceeding, in order to prevent his obtaining an undue advantage.—*Phillips v. Hayward*, 3 D. P. C. 362.

### DEVISE.

1. (*Estate in fee or for life.*) Testator gave a pecuniary legacy to his heir-at-law, and directed that his debts and funeral expenses should be paid and discharged by his executrix thereafter mentioned. He then gave to his daughter E. S., whom he made, constituted and ordained his executrix, all and singular his lands, tenements and messuages, to be by her freely possessed and enjoyed: Held, that she took a life-estate only.—*Doe d. Ashby v. Baines*, 2 C., M. & R. 23.
2. (*Same.*) Devise of a house, &c. to B., his heirs and assigns for ever, with the intention that he may enjoy the same during his life, and by his will dispose of the same as he thinks proper. B. takes an estate in fee, and not merely an estate for life with a testamentary power of appointment.—*Doe d. Herbert v. Lewis*, 4 N. & M. 696.

### DISTRESS.

1. (*For assessed taxes—Demand and refusal.*) To authorize a levy under 43 G. 3, c. 99, s. 33, for arrears of assessed taxes, it is not necessary that they should have been demanded by the collector in person from the householder in person, or that there should have been a direct refusal of payment to the collector in person; it is sufficient if a demand has in fact been made by the collector or a person authorized by him, and the householder has refused payment, whether on the ground of inability or for any other cause. Nor is it necessary that the collector should, in the demand, have specified the exact sum.

An indictment stated that the defendant made an assault on a person in lawful possession of goods under a levy for a *specified sum* of money for arrears of assessed taxes, with intent unlawfully to force him out of possession. Lord Denman, C. J. ruled that it was necessary to prove that the specified sum was due, although he thought no sum need have been stated.—*Rex v. Ford*, 4 N. & M. 451.

2. (*Right of, how suspended.*) The giving of a promissory note by the tenant to the landlord for rent in arrear, does not of itself suspend the right of distress till the note is due. (Bull. N. P. 182, a; 2 Ves. & B. 416; 5 T. R. 513; 2 Chit. Rep. 245; 1 Salk. 325; Cowp. 47.)—*Davis v. Gyde*, 4 N. & M. 462.
3. (*For taxes, mode of making.*)—A collector of taxes has no right to take a constable or other person with him into the house of a party of whom he goes to demand payment of arrears of taxes and to levy a distress for such arrears if necessary, unless he has reasonable ground for apprehending an assault will be committed on him, or that the distress will be resisted. But where a collector unwarrantably, but without any objection being made, introduced a constable into the house of a party from whom he came to demand taxes, and afterwards, reasonable ground to apprehend violence arising, the collector introduced another constable, on whom the party committed an assault; it was held no answer to an indictment for such assault



on the constable "in the execution of his duty," that the collector had wrongfully introduced the first constable.—*Rex v. Clarke*, 4 N. & M. 871.

And see LANDLORD AND TENANT, I.

### EASEMENT.

(*Extinguishment of, by unity of possession.*) A unity of possession of the land from which, and of the land over which, an easement exists, does not extinguish but only suspends the easement, where the party is seised in fee of the one parcel, and only possessed for the residue of a term of the other.

A right to have the droppings of rain falling from a man's wall upon the premises of another, is not destroyed by his raising the height of the wall.—*Thomas v. Thomas*, 2 C., M. & R. 34.

### EJECTMENT.

1. (*Adverse possession.*) Lessee for years determinable on lives, at a nominal rent, falsely asserting that one of the cettux que vie is alive, holds over for twenty years, without paying the reserved rent. The lessor, having notice of the determination of the lives, grants a fresh lease to another person, who neglects to enter for the twenty years: Held, that the possession of the lessee holding over was not an adverse possession to the reversioner.—*The King v. Inhabitants of Axbridge*, 4 N. & M. 477.
2. (*Service.*) The declaration was served on the son of the tenant in possession before the first day of term, and the tenant, after that day, acknowledged that he had received it, but not when: Held insufficient to entitle the plaintiff to a rule for judgment against the casual ejector.—*Doe d. Marshall v. Roe*, 4 N. & M. 553.
3. (*Limitation of.*)—A. devised to B., his wife, in fee. B. entered in 1772, and married C. After a few years they quitted possession, and removed to another county. B. died in 1828, and C. in 1832, without having levied any fine, leaving a son D.: Held, that an ejectment brought by D. in 1835, was barred by 3 & 4 W. 4, c. 27, s. 17.—*Doe d. Corby v. Branson*, 4 N. & M. 664.
4. (*Service.*) Where a portion of the premises in ejectment consisted of uninhabited and unfinished houses, the Court would not allow the affixing of the declaration on the doors of those houses to be deemed good service. The party should have proceeded as in the case of a vacant possession.—*Doe d. Showell v. Roe*, 2 C., M. & R. 42.
5. (*Judgment as in case of nonsuit.*) It is no answer to a motion for judgment as in case of a nonsuit in ejectment, where the landlord defends, that the tenants in possession have given up possession of the premises to an agent of the lessor of the plaintiff.—*Doe d. Draycott v. Dyos*, 2 C., M. & R. 60.
6. (*Service on wife.*) Where the wife on the premises, having received the declaration, prevented the person serving it from giving an explanation or reading it over, the service was held sufficient.—*Doe d. George v. Roe*, 3 D. P. C. 541.

7. (*Setting aside proceedings in.*) After the execution of the writ of possession, the Court will not set aside the proceedings on payment of the rent due and costs of the action, if there are other grounds of forfeiture besides the non-payment of rent; and the Court dismissed such an application with costs.—*Doe d. Lambert v. Roe*, 3 D. P. C. 557.
6. (*Service.*) One of the tenants in possession was a Welchman, who did not understand English; the party making the service did not understand Welch; he therefore desired another tenant to interpret to the former the nature and object of the declaration; and deposed that he heard and saw the tenant speaking, and, as he believed, interpreting the explanation which he, the deponent, gave: Held sufficient.—*Doe d. Probert v. Roe*, 3 D. P. C. 335.
9. (*Notice.*) In the notice, at the foot of the declaration, the clause "or you will be turned out of possession," was omitted: Held insufficient; but it was allowed to be amended on terms.—*Doe d. Darwent v. Roe*, 3 D. P. C. 356.
10. (*Declarations of tenant's wife.*) Declarations by the tenant's wife that he is out of the way to avoid being arrested or annoyed, cannot be used for the purpose of obtaining judgment against the casual ejector.—*Doe d. Wilson v. Smith*, 3 D. P. C. 379.
11. (*Service.*) Service on the tenant's sister, who said she would accept it on her sister's behalf: Held insufficient without proof of agency.—*Doe d. Tibbs v. Roe*, 3 D. P. C. 380.
12. (*Service—Mistake in notice.*) The notice was directed to John C.: the name of the tenant was Thomas C. The party serving, however, informed him that he was the person meant by the notice: Held sufficient.—*Doe d. Frost v. Roe*, 3 D. P. C. 563.
13. (*Service.*) If the tenant in possession by fraud or violence prevents a complete and regular service, judgment may still be had against the casual ejector.—*Doe d. Frith v. Roe*, 3 D. P. C. 569; and see *Doe d. Wills v. Roe*, *ib.* 582.
14. (*Judgment against casual ejector, time for.*) If a regular service is effected before the term in which the appearance is to be made, a motion for judgment may be made in the following term on the same service. (1 D. P. C. 494; 2 D. P. C. 196.—*Doe d. Thompson v. Roe*, 3 D. P. C. 575.
15. (*Service.*) Where the service was on the son [or agent] of the tenant on the premises, and it clearly appeared that the tenant was keeping out of the way to avoid service: Held sufficient for a rule nisi, to be served in the same manner.—*Doe d. Luff v. Roe*, 3 D. P. C. 575; *Doe d. Morpeth v. Roe*, *ib.* 577.

#### EVIDENCE.

1. (*To support bad plea.*) If issue be taken on a plea which is bad because repugnant to the admission of the parties on the record, the defendant cannot be shut out from giving evidence, relevant to the issue, in support of such plea.—*Bowman v. Rostrow*, 4 N. & M. 551.

2. (*Of reputation.*) Evidence of reputation is not admissible on a question whether, by custom, the sheriff of a county, or of a city within it, was bound to do execution on criminals condemned to death by a judge of gaol delivery, at the assizes for the county; for it is not a question of public right.—*Rex v. Antrobus*, 4 N. & M. 565.
3. (*Variance.*) A plea to a declaration for work and labour, set out an agreement that the plaintiff should not be paid unless the work were completed within fourteen days before Michaelmas-day. The evidence was of an agreement that he should not be paid unless the work should be completed fourteen days before Michaelmas-day: Held, that the evidence did not support the plea.—*Thomas v. Lambert*, 4 N. & M. 592.
4. (*Secondary evidence—Notice to produce.*) In ejectment by the heir of A., the defendant set up a will of A., by which he devised his real estate in fee to B., through whom the defendant claimed. One of the attesting witnesses to this will stated that he prepared it; and that a fortnight after its execution he prepared another will for A., which A. executed and delivered to him, and which the witness, on A.'s death, delivered to B. No notice was given to the defendant to produce this last-mentioned will: Held, that the plaintiff's counsel could not ask the witness whether, at the time of executing this instrument, A. declared it to be his last will, and whether it was attested by three witnesses.  
And *semble*, that an instrument which has been traced to the hands of an opposite party can in no case be presumed to have been lost or destroyed, where there has been no notice to produce it.—*Doe d. Philips v. Morris*, 4 N. & M. 598.
5. (*Of local acceptance of word.*) In an action for breach of a covenant in a lease of coal mines, to get the whole of the veins of coal lying under certain closes, "not deeper than the level of the bottom of the mine" at a certain point: Held, that evidence was receivable to show that by the miners in the neighbourhood the word *level* was used in a certain peculiar sense.—*Clayton v. Gregson*, 4 N. & M. 602.
6. (*Proof of deed produced on notice.*) Where the defendant claimed title to certain goods under an assignment, and in pursuance of notice produced it at the trial when called for by the plaintiffs: Held, that the plaintiffs were entitled to read it in evidence without calling the attesting witness, though they impugned the validity of the assignment on the ground of fraud. (3 Taunt. 60; 6 B. & C. 28.)—*Carr v. Burdiss*, 1 C., M. & R. 782.
- (*Admissibility and effect of former judgment between same parties.*) In an action by A. and B. for diverting water from their works, it appeared that A., when in the sole possession of the same works, had brought a former action for a similar injury against the same defendants, in which he had recovered a verdict and judgment against them; and it being proved that A. and B. were now in possession of the same works, Held, that this was abundant *primâ facie* evidence that the present plaintiffs were privy in estate to the former plaintiff, and that the verdict and judgment in the

former action were admissible in evidence against the same defendants in this action; and that the circumstance of B.'s having been examined as a witness in the former action, when he was disinterested, did not render such verdict and judgment inadmissible. (1 P. Wms. 288; 1 Campb. 9, 151.)—*Blakemore v. Glamorganshire Canal Company*, 2 C., M. & R. 133.

8. (*Best evidence.*) In assumpsit for refusing to allow the plaintiff to proceed with certain work according to agreement, the defendant pleaded that the work was to be done to the satisfaction of A. B.; that the part done was not done to his satisfaction, and therefore the defendant discharged the plaintiff: Held, that upon issue joined in this plea, the defendant was not bound to call A. B.—*Vickers v. Cock*, 3 D. P. C. 492.

And see ACCOUNT STATED; PLEADING, 8, 16, 17; PROMISSORY NOTE, 1, 2, 3.

### EXECUTION, IN CRIMINAL CASES.

(*Liability of sheriff to execute.*) A sheriff is not bound at common law to execute prisoners sentenced to death by a justice of gaol delivery for the county, unless he has the legal custody of them, or legal means of obtaining such custody. (2 Hale P. C. 31, 470.)

The custody of the prisoners in the county gaol of Cheshire belongs to a patent officer (the constable of Chester Castle) independent of the sheriff. The judge of gaol delivery signed an order to the constable, by which he was required to deliver up certain prisoners condemned to death, and in the same order the sheriffs of the city of Chester were directed to execute them. A signed calendar of the prisoners was afterwards delivered to the sheriff of the county; he refused to execute the prisoners, on the ground that he conceived the sheriff of the city liable by law to do so. Held, that he was not liable on an information charging that it was by law his duty to do execution, and that he neglected and refused to do so; and that the signed calendar had no operation as a warrant or order to him to execute, but was a mere *memorial*, without which he would have been bound to execute, if he had had the legal custody; and that, in order for him to *obtain* the legal custody, there ought to be an order to the constable to deliver to him, and a distinct order to him to receive and to execute the prisoners so being in his custody.

Held, also, that on the trial of such information, an order of the Court of gaol delivery, requiring a former sheriff to hang a criminal in chains, and an examined copy of the cravings of that sheriff, filed in the Exchequer, wherein he craved to be allowed his expenses of executing such criminal, which expenses were allowed by the then Chancellor of the Exchequer,—were admissible in evidence for the Crown.—*Rex v. Antrobus*, 4 N. & M. 565.

### EXECUTOR AND ADMINISTRATOR.

(*Liability of, to costs.*) Where an executor sues on a promise to himself, and there is a verdict against him, the defendant is not deprived of his

costs by the stat. 3 & 4 W. 4, c. 42, s. 31. (1 Bing. N. C. 301. The case of *Lysons v. Barrow*, 10 Bing. 563, was denied to be law.)—*Ashton v. Poynter*, 1 C., M. & R. 738; 3 D. P. C. 465.

**FORFEITURE.** See CHARTER.

**FRAUDS, STATUTE OF.**

1. (*Statement of consideration.—Pleadings.*) A declaration in assumpsit stated that A. owed the plaintiff 5*l.*, and the plaintiff had a lien on A.'s goods; that defendant, in consideration that plaintiff would abandon such lien, promised to see him paid the said sum of 5*l.* within three months: that plaintiff abandoned his lien, but defendant did not pay. Plea, that the promise was a special promise to answer for the debt and default of another, but that there was no agreement in writing stating the consideration, and that the promise was contained in a certain memorandum in the following form:—"I hereby agree to see you paid, within three months from date hereof, the amount of 5*l.* due to you on account of Mr. A. Signed, &c." Held, on demurrer, that the plea was an answer to the declaration, without stating that there was no *other* consideration for the promise, for that *prima facie* the promise was within the statute of frauds, and that the agreement set out in the plea was insufficient, for want of statement of consideration, and that *evidence* of consideration was inadmissible in cases within the statute. (4 B. & A. 595.)—*Clancy v. Piggott*, 4 N. & M. 496.

2. (*Written memorandum.—Substituted contract.*) Assumpsit on a guarantee for certain goods supplied by plaintiff to H. Plea, that before breach it was agreed between the plaintiff and defendant, that the plaintiff should supply goods to H., to be paid for at the end of three months, by a bill at four months, to be accepted by defendant; which agreement the plaintiff, before breach, accepted in discharge of the former agreement, and released the defendant from the performance thereof. On demurrer: Held, 1st, that the agreement stated in the plea was an *original* undertaking, not required to be in writing by the statute of frauds; 2dly, that it was not an accord and satisfaction, but a substituted contract, and as such a defence to the action.—(Sir T. Raym. 450.)

*Seem*, that the plea need not have shown that the time of credit given by the bill was still continuing. (*Edmunds v. Harris*, 4 N. & M. 182, was doubted.)—*Taylor v. Hilary*, 1 C., M. & R. 741; 3 D. P. C. 461.

**GRANT.**

(*Of licence to sport over manor.*) A demise in writing, but not under seal, of a messuage, and full and free exclusive licence and leave for the lessee, his friends, gamekeepers, &c. to hunt, hawk, course, shoot, and sport, in, over, and upon, a manor of the lessor, and to fish in the ponds and waters thereof, from August to February following, at an entire rent, is altogether void. (Cro. Jac. 453; L. Raym. 77; 5 B. & C. 875. 221; 2 B. & Ad. 336.)—*Bird v. Higginson*, 4 N. & M. 505.

**GUARANTEE.**

1. A. in consideration of B.'s supplying C. with goods, guaranteed to B. the

payment of the price, on condition that no application should be made to A. for the amount, or any part of it, except on the failure of B.'s utmost efforts and legal proceedings to obtain the same from C. C. remained in England two years, then went abroad insolvent, not having paid the debt. No proceedings were taken against him until four years after the giving of the guarantee, when process was issued and continued on the roll, C. remaining abroad until more than two years longer. Held, that the guarantee was discharged by B.'s laches.—*Holl v. Handley*, 4 N. & M. 515.

2. (*Acceptance of*.) Guarantee in the following terms:—"F. informs me that you are about publishing an arithmetic for him. I have no objection to being answerable as far as 50*l.*: for my address apply to B." Signed, "G. T." This memorandum was written by B., who added, "Witness to G. T.—J. B." B. forwarded it to the plaintiffs, who never communicated to G. T. their acceptance of it. Held, that they were not entitled to recover upon it against G. T. (1 M. & S. 557).—*Mosley v. Tinkler*, 1 C., M. & R. 692.

And see LIMITATIONS, STATUTE OF, 1.

### HABEAS CORPUS.

1. (*From Palace Court.—Render in discharge of bail*.) A cause was removed by *habeas corpus* from the Palace Court into the K. B., but was remanded back by *procedendo*, and afterwards interlocutory judgment was signed in the Palace Court, and a writ of inquiry executed. Held, that the bail of the same defendant, in another action brought in the Exchequer, had no right to remove the former cause again by *habeas corpus*, in order to render the defendant in discharge of his bail in the Exchequer. But the Court gave the bail time to render, until fourteen days after the expiration of the custody in the Palace Court, no cause being shown against so much of the rule as asked for such time.—*Lawes v. Hutchinson*, 1 C., M. & R. 766; 3 D. P. C. 506.
2. (*Procedendo*.) It is no objection to a *habeas corpus* that an attorney suing it out is not on the roll. (3 D. P. C. 56.) The 21 J. 1, c. 23, s. 3 as to *procedendo*, does not apply to applications by bail.—*Glynn v. Hutchinson*, 3 D. P. C. 523.
3. Where a writ of *habeas corpus* to remove from the Palace Court a cause in which judgment had been suffered by default, was not delivered till after the jury had assessed the damages on the writ of inquiry, the Court issued a *procedendo*. (Barnes, 221; 7 D. & B. 769; 6 Bing. 433; 2 Burr. 738, 1151).—*Smith v. Sterling*, 3 D. P. C. 609.

### HUSBAND AND WIFE.

(*Evidence of wife's agency*.) The defendant's wife ordered goods of the plaintiff, to be sent to the house of a relation of the defendant's. On the following day the plaintiff saw the defendant, and the latter accepted a bill for the price, which he paid when due, and then ordered goods to a small amount from the plaintiff for himself. His wife subsequently ordered other goods of the plaintiff, to be sent to the same place as the former. In an action for the price of these goods, Held, that there was

evidence to go to the jury of the husband's having so conducted himself as to lead the plaintiff to believe that the wife had his authority to order them. (Ry. & M. 217, 226.)—*Filmer v. Lynn*, 4 N. & M. 559.

And see AFFIDAVIT TO HOLD TO BAIL, 2.

### ILLEGAL CONTRACT.

(*Parties to, when concluded from disputing.*)—In an action by A. against B. for work and labour, it was proved that malt had been sold by B. to A. by an illegal measure, but that after the sale an account was stated and settled between the parties, showing a balance due to B., and was signed by A. : Held, that B. was entitled to set off his demand for the malt, such settlement being equivalent to payment.—*Owens v. Denton*, 1 C., M. & R. 711.

And see PLEADING, 17, 18.

### INFANT.

(*Discharge of from execution.*)—The Court refused to discharge an infant defendant from execution for damages and costs in an action of slander, though the Insolvent Court had refused to relieve him, because, by reason of his infancy, he was unable to make the assignment of property required by the Insolvent Act.—*Defries v. Davies*, 3 D. P. C. 629.

### INSOLVENT.

A claim against an insolvent, which at the time of making his schedule depends on a contingency, is not barred by the act.—(2 Chit. Rep. 222, 448; 6 Bing. 291.)—*Lawrence v. Walker*, 3 D. P. C. 614.

### INSURANCE.

(*Warranty to sail.*) On the second trial of the case of *Cockrane v. Fisher*, (2 C. & M. 581; *ante*, vol. xiii., p. 463,) the jury found, in addition to the former facts, that the master and crew fully intended to sail for Quebec on the 15th of August, if it had been possible, and used every means and exertion to do so, and intended by so doing to put themselves in a better situation for the prosecution of the voyage, and not merely and solely to fulfil the warranty: Held, that the warranty was complied with.—*Cockrane v. Fisher*, 1 C., M. & R. 809.

### INTERPLEADER ACT.

1. The *sheriff* need not wait for proceedings to be commenced before he applies to the Court for relief under s. 6 of the act. A *stakeholder* (under s. 1,) must.—*Green v. Brown*, 3 D. P. C. 337.
2. If the execution creditor abandon his process against goods seized under a *fi. fa.* in favour of a claimant, the sheriff has still a right to show, in an action against him, that the goods before were the property of the defendant.—*Baynton v. Harvey*, 3 D. P. C. 344.
3. (*Costs.*) Where an issue was directed to be tried between an execution creditor and a claimant, brought before the Court by the sheriff, but the claimant refused to try it, and abandoned his claim, he was held liable to pay the execution creditor's costs down to the time of the abandonment of the claim, and his costs of applying to take out the money paid into Court by the sheriff.—*Wills v. Hopkins*, 3 D. P. C. 346.

4. (*Stay of proceedings.*) A rule under s. 1 of the Interpleader Act cannot be drawn up for a stay of proceedings, unless notice have been given. Such a rule may be drawn up to show cause at chambers.—*Smith v. Wheeler*, 3 D. P. C. 431.
5. (*Sheriffs' relief.—Attachment.*) Where the sheriff applied for relief under the act, but it appeared that an attachment had already been obtained against him for not returning the writ, the Court would only make the rule absolute on the terms of his paying the costs of moving for the attachment.—*Alemore v. Adeane*, 3 D. P. C. 498.
6. (*Time for application by sheriff.*) Where the sheriff received notice of a claim on the 23d of January, he was held too late in applying for relief in Easter Term.—*Ridgway v. Fisher*, 3 D. P. C. 567.
7. (*Same.*) The sheriff, having seized on the 24th of December, received on the 28th a notice that a fiat in bankruptcy was about to issue against the defendant. Assignees were not appointed until the 7th of April. On the second day of Easter Term, the sheriff applied to the Court. Held in time.—*Barker v. Phipson*, 3 D. P. C. 590.
8. (*Costs.*) The Court of C. P. refused to allow the sheriff his costs, where the claimant did not appear; nor will the plaintiff be allowed his costs, except in case of extremely improper conduct in the opposite party.—*Oram v. Sheldon*, 3 D. P. C. 640.

#### LANCASTER COURT OF COMMON PLEAS.

The Court of Exchequer has no power, under the 4 & 5 W. 4, c. 62, s. 26, to order judgment to be entered up *non obstante veredicto*, in a cause out of the Court of C. P. at Lancaster.—*Potter v. Moss*, 3 D. P. C. 432.

#### LANDLORD AND TENANT.

1. (*Implied agreement not to distrain.*) A tenant gave a bill of sale to a creditor, under which his goods (including certain eatage) were just about to be sold, when the landlord put in a distress: whereupon it was agreed that the sale should proceed, and that the landlord should be paid his arrears out of the proceeds of the goods and eatage. The plaintiff purchased the eatage, and put in his cattle to depasture it; but the amount of the sale not having been sufficient to satisfy the arrears of rent, the landlord distrained again, and took those cattle as a distress. Held, (*Parke, B. diss.*) that a contract was to be implied on the landlord's part not to distrain on the cattle of the purchaser of the eatage.—*Horsford v. Webster*, 1 C., M. & R. 696.
2. (*Action for mismanagement of farm—Custom of the country.*) In an action by landlord against tenant for not properly cultivating a farm, the declaration alleged that the defendant undertook to cultivate and manage the farm and lands according to the course of good husbandry and the custom of the country where the farm was situate; and then averred that according to the course of good husbandry and the custom of the country, the defendant ought to have had about one half only of the arable lands in corn, one fourth in seeds, and one fourth in turnips or fallow; and alleged as a breach, that he had more than one half in corn, &c. &c.



The defendant, in his plea, traversed the custom as alleged in the declaration. The jury found that the custom was not such as the plaintiff had alleged, but that the farm had been cultivated contrary to the course of good husbandry in the neighbourhood. Held, that the plaintiff had tied himself up to the precise custom as alleged in the declaration, and having failed to prove it, was not entitled to recover.—*Angerstein v. Handson*, 1 C., M. & R. 789.

3. (*Eviction—Apportionment of rent.*) Lessee of 100 acres of land for a year accepted the lease, and entered upon the land. On his entry, he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until a half-year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession during the remainder: Held, that this was not a case of eviction by the landlord, but that the rent was apportionable, and that the landlord was entitled to distrain for such apportioned rent. (Co. Litt. 148 b; Gilbert on Rents, 179; 2 Co. Rep. 503; Moore, 50; 2 B. & Ald. 336.)—*Neale v. Mackenzie*, 2 C., M. & R. 84.

4. (*Determination of tenancy at will.*) A feoffment by a lessor, with livery of seisin made on the land, operates as a determination of a tenancy at will, although the tenant at will be off the land when the livery is made, and has had no notice of the determination of the will. (Com. Dig. Estate, H. 6; Dyer, 186.)—*Ball v. Cullimore*, 2 C., M. & R. 120.

## LEASE.

(*Liability of assignee on covenants.*) The assignee of a lease is liable for the breach of a covenant running with the land, incurred in his own time, although the action is not commenced until after he has assigned the premises. (1 Salk. 81; 1 Vern. 165; Ambl. 480; 2 Atk. 219, 546; 2 Madd. 330, 341.)—*Harley v. King*, 2 C., M. & R. 18.

## LIBEL.

1. (*Innuendo—Costs.*) In a count in a declaration for libel, various parts of one continuous article, in which the plaintiff was not mentioned by name, were applied to him by innuendoes. Under the general issue pleaded, the jury negatived the greater part of the innuendoes. The plaintiff was held entitled to costs in respect of that part of the libel only which was found to apply to him.—*Prudhomme v. Fraser*, 4 N. & M. 512.

2. (*Innuendo, whether too large.*) In libel, one of the counts set forth the following libel, addressed in a letter to the plaintiff's master:—"I (meaning the defendant) have reason to suppose that many of the *flowers* of which I have been robbed are growing upon your premises (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain *plants, roots and flowers* of the defendant, and had disposed of them unlawfully to the said P., and unlawfully placed them in the garden of the said last-mentioned person)." Held, on motion in arrest of judgment, on the ground that larceny could not be committed of flowers,

and that the innuendo was too large, that the count was good.—*Gardiner v. Williams*, 2 C., M. & R. 78.

3. (*Report of proceedings in Court of Justice.*) In an action against the publisher of a newspaper for a libel, on the plea of not guilty, it appeared that the libel purported to be the account of a trial of a former action, brought by the present plaintiff against other parties for a libel, and after stating the libel in the original action, and the facts proved by the then defendants, and the summing up of the judge, it stated that the jury found a verdict for the plaintiff, with 30*l.* damages. No evidence was given as to any such trial having taken place in fact, or whether the report was fair or not. It was left to the jury to say whether the report, although it contained some allegations injurious to the plaintiff, was, if taken altogether, with the statement of the verdict being in his favour, injurious to the plaintiff on the face of it: and the jury having found for the defendant, the Court refused a rule for a new trial.—*Chalmers v. Payne*, 2 C., M. & R. 156.

#### LIEN.

8. contracted with the defendants to execute an extensive building operation for them, in consideration of a certain sum, and of being allowed to use certain materials. The defendants' engineer was empowered to reject any materials or work not in his opinion conformable to the plans and specifications, and to provide other materials and employ competent persons to perform the work, if S. failed to do so, and to deduct the amount from the sum payable to him under the contract. The defendants were at liberty to diminish or add to the works, paying S. at the contract prices accordingly, or deducting from them if necessary. S. placed on the defendants' premises steam-engines, rail-roads, materials, implements, and other articles of various kinds, necessary to carry on the works. The defendants' engineer visited the premises daily, and rejected such of the materials as he thought unfit for use. During the progress of the works advances were made by the defendants to S. on his application; he agreeing that all the engines, materials, &c. brought or to be brought on the defendants' premises for use in constructing the works, should be a security for such advances. Those advances always exceeded the value of the property so on the premises. S. became bankrupt before the works were completed, on which the defendants erased his marks on the engines, materials, &c. then on their premises. In trover by the assignees of S. to recover these articles: Held, first, that the arbitrator had no power to award that the defendants were entitled to prove against S.'s estate for the sum advanced by them to him, beyond the value of the work and materials, and of the engines, &c. agreed to stand as security. Secondly, that the assignees were not entitled to recover for extra work done by the bankrupt. Thirdly, that the defendants' possession of the engines, &c. was sufficient to support the lien given them by the agreement with S., and therefore that the assignees could only recover for such materials, &c. as came on the premises after the act of bankruptcy. Fourthly, that payments by the defendants to the bankrupt, after the latter portions of materials came on

the premises, could not be considered as payments for those particular goods in the course of business, but as general advances only, so that they could not be retained by the defendants under 6 Geo. 4, c. 16, s. 82.—*Crowfoot v. London Dock Company*, 4 Tyrw. 967.

#### LIMITATIONS, STATUTE OF.

1. A., in consideration of B.'s supplying C. with goods, guaranteed the payment of the price. Goods having been accordingly supplied to C., for which he neglected to pay, A., in consideration of B.'s extending to C. a period of two years for the liquidation of his debt, agreed to reserve to B. all right and claim which he might then have against him, A., by virtue of the security previously entered into on C.'s part, and to be bound by it, if, at the expiration of such period, B.'s demand should not have been fully discharged. Held, that A.'s liability attached on default made by C., after the expiration of two years; that B.'s right of action then accrued; and therefore that the statute of limitations then began to run.—*Holl v. Hadley*, 4 N. & M. 515.
2. (*Open account*.) A. occupied a house and land under B. at the rent of 16*l.* a year, and at B.'s request entered into his employment as a farming bailiff, and to perform other services, in the place of another person who had been employed by B., and had been paid 12*s.* a week. A. continued in B.'s service for more than twelve years, but there was no payment of rent on the one hand, or of wages on the other. In an action brought by A., to recover wages for twelve years, deducting the rent,—Held, that this was not such an open account as would take the case out of the statute of limitations, since the 9 Geo. 4, c. 14; but that there must be a *part payment in cash*, or what is equivalent to it, to have that effect.—*Williams v. Griffith*, 2 C., M. & R. 45.
3. (*Continuance by writ*.) A writ issued under 2 Will. 4, c. 39, s. 10, to save the statute of limitations, may be returned *non est inventus* without any attempt at service.—*Williams v. Roberts*, 1 C., M. & R. 676; 3 D. P. C. 512.
4. (*Acknowledgment*.) Assumpsit for goods sold and delivered. Pleas, the general issue and the statute of limitations, which was traversed by the replication. The plaintiff proved an admission by the defendant, such as would have been evidence to go to the jury on the general issue, that a debt was owing from him to the plaintiff. The defendant gave no evidence in support of the plea. Held, that the plaintiff was bound to support the affirmative terms of his replication by showing that the debt was contracted within six years, or proving a sufficient acknowledgment or promise in writing, pursuant to 9 Geo. 4, c. 14: and a nonsuit was entered accordingly.—*Wilby v. Henman*, 4 Tyrw. 957.

And see PRACTICE, 31; TROVER, 2.

#### LUNATIC.

(*Order of maintenance of—Retrospective order*.) The 9 Geo. 4, c. 40, s. 38, does not authorize a *retrospective order* for the maintenance of a lunatic.

An order under that act, stating that the party (who was not settled in

the parish in which he was found) was so far disordered in his senses that it was dangerous for him to be permitted to go abroad, and that the justices had adjudged that his settlement was in parish A., was held sufficient, though the form given in the schedule to the act was not pursued, and the order contained no words of present adjudication. (8 B. & C. 78.)—*The King v. Inhabitants of St. Nicholas, Leicester*, 4 N. & M. 624.

#### MAGISTRATE.

(*Mandamus to.*) The Court will not compel magistrates, by mandamus, to issue a distress warrant to enforce the payment of poor-rates, where it is doubtful whether the warrant would be legal, and the rates are recoverable by another mode of proceeding.—*Rex v. Hall*, 4 N. & M. 546.

**MALICIOUS ARREST.** See PRACTICE, 9.

#### MALICIOUS PROSECUTION.

(*Proof of termination of proceedings.*) In an action for maliciously and without probable cause informing against the plaintiff for an offence, it was held a sufficient answer to say that the plaintiff, having been convicted of trespassing on land in pursuit of game, under the 1 & 2 W. 4, c. 32, s. 30, underwent the sentence of imprisonment according to such conviction, without appealing against it under s. 44.—*Mellor v. Baddeley*, 4 Tyrw. 962.

#### MANDAMUS.

1. (*Costs.*) Under the 1 W. 4, c. 21, s. 6, the costs of a mandamus and of applying for it, may be obtained of the Court by a distinct motion, after the issuing of the writ.

And upon such motion for costs, the Court will refer for its guidance to the affidavits filed in support of the application for a mandamus, if it be clear that both applications are made by the same parties.—*Rex v. Kirke*, 5 B. & Ad. 1089.

2. (*To re-hear case.*) A Court of competent jurisdiction cannot be required by mandamus to re-hear, or to receive a petition to re-hear, a case already decided by them. (2 Chit. Rep. 250.)—*Exp. Smyth*, 4 N. & M. 582.

**MANOR.** See COMMON; GRANT.

**MARKET OVERT.** See TROVER, 1.

#### MASTER AND SERVANT.

(*Menial servant—Notice to quit.*) The plaintiff agreed to enter the defendant's service as head-gardener, and to have the management of his hot-houses, pineries, &c. at the wages of 100*l.* a year. He resided in a lodge at the gate of the defendant's lawn. He was allowed to take apprentices, and had taken two at 15*l.* a year premium. He remained with the defendant in this capacity upwards of four years, when the defendant gave him a month's warning. In an action by the plaintiff to recover a quarter's wages, as being a yearly servant, Held, that he was

a menial servant only, and only entitled to a month's warning. (4 Bing. 309; 5 B. & Ad. 789, 904.) *Nowlan v. Ablett*, 2 C., M. & R. 54.

### MISNOMER.

The plaintiff declared by the name of *William Moody*, and the cause proceeded to issue in that name. It was sworn that the party intended as plaintiff was *John Moody*; but there appeared to be a *William Moody*, a son of *John*, who was connected with the transaction in question. The Court refused a rule to amend the proceedings by inserting the name of *John* instead of *William*, observing, that if the former were really the person originally intended as plaintiff, the misnomer could not be taken advantage of at the trial.—*Moody v. Aslatt*, 1 C., M. & R. 771; 3 D. P. C. 486.

### MONEY HAD AND RECEIVED.

1. (*Failure of consideration—Conditional contract.*) A. contracted with B. for the purchase of the good-will and fixtures of a public-house, at the sum of 120*l.*: 50*l.* was to be paid as a deposit, on the landlord's consenting to the change of tenancy, and on the remainder of the purchase-money being paid, A. was to have possession. The landlord, on being applied to, gave a verbal consent, and the 50*l.* was thereupon paid. A. sent part of his furniture to the house, and went to reside in part of it; B. still continuing to reside and carry on the business there. Some time afterwards, the remainder of the purchase-money not having been paid, and possession not having been given up to A., the landlord withdrew his consent. Held, that the contract was conditional on the landlord's consent being obtained; and that the verbal consent originally given having been withdrawn before any change of tenancy, it must be considered as not having been given; and the condition not having been performed, that the money was paid on a consideration which had failed, and that A. might maintain money had and received to recover back the 50*l.*—*Wright v. Newton*, 2 C., M. & R. 124.
2. (*Payment under legal process.*) A. being arrested, gave a bail-bond to the sheriff, but did not perfect bail, whereby the sheriff became fixed. Proceedings having been taken on the bail-bond, a judge at chambers made an order, on the application of the bail, that proceedings should be stayed on payment of debt and costs, which were accordingly paid by A.'s attorneys, on the 27th of October. A. had supplied his attorneys with money towards payment of the debt and costs on the 10th of October, and on the 14th he became bankrupt. Held, that this was a payment under process of law, and that the assignees of A. could not recover the money back.—*Belcher v. Mills*, 2 C., M. & R. 150.

And see POOR-RATE, 3.

### MORTGAGOR AND MORTGAGEE.

- (*Power of sale.*) A mortgagor covenanted to surrender copyhold land to A., on trust, in case of default in payment of the mortgage money, to sell and dispose of the premises when the mortgagee should think proper. Held,

that a request by the mortgagee was a condition precedent to the power to sell.—*Watson v. Waltham*, 4 N. & M. 537.

## NEW TRIAL.

(*On ground of witness being kept away*.) If a material witness for the plaintiff be prevented from attending by the fraud and practice of the defendant or his attorney, the plaintiff should apply to the judge to postpone the trial, or withdraw the record. If he proceeds to trial and is nonsuited, the Court will not grant a new trial.—*Turquand v. Dawson*, 1 C., M. & R. 709.

NONSUIT. See PRACTICE, 7.

## OUTLAWRY.

(*Exigent.—Proclamations*.) The *exigent* is not a writ within the meaning of the Uniformity of Process Act, 2 W. 4, c. 39, s. 12.

The *exigent* directed the proclamations to be made at the parish church of the parish in which the defendant resided. Held, that this was sufficient, unless it were shown that there was any nearer church or chapel; and that it was not necessary to state in the *exigent* that there was none such. (31 Eliz. c. 3, s. 1.)—*Lewis v. Davison*, 1 C., M. & R. 655.

And see PROCESS, 1.

## PARTNERSHIP.

(*Implied authority of partners*.) One partner has no implied authority to bind his co-partner by a submission to arbitration respecting the matters of the partnership. (3 Bingh. 101.)—*Adams v. Bankart*, 1 C., M. & R. 681.

## PENAL ACTION.

(*Compounding*.) Leave of the Court for compounding a penal action cannot be obtained without the Attorney General's consent, where the Crown is entitled to a portion of the penalty.—*R. v. Gibbs*, 3 D. P. C. 345.

## PLEADING.

1. (*For use and occupation of in corporeal hereditaments*.) On a count in assumpsit to recover a rent reserved by parol demise, by the plaintiff to the defendant, of an incorporeal hereditament, stating that the defendant actually occupied under such demise, the plaintiff may recover for the use and occupation; but not on a count stating merely that the defendant entered and became and was possessed of the messuage, right, &c. so to him granted as aforesaid.—*Bird v. Higginson*, 4 N. & M. 505.
2. (*New Rules.—Actionem non &c.*) The statement of *actionem non*, and the prayer of judgment, are dispensed with by rule 9, H. T. 4 W. 4, in a plea pleaded to the whole of one of several counts.—S. C.
3. (*Repugnancy*.) Drawer v. acceptor of a bill of exchange. The defendant pleaded, that before the making of the bill it was agreed between the plaintiff and the defendant that the plaintiff should consign to J. N. certain goods, and that out of the proceeds of such goods the plaintiff should direct J. N. to pay defendant a sum equal to the amount of the bill; and that in case the proceeds should not have arrived in England when the bill became due, the bill should be renewed: that the proceeds had not arrived

when the bill became due; that plaintiff declined to draw another bill; and that it was thereupon agreed that defendant should write to J. N., directing him to pay the whole of the proceeds to the plaintiff; that defendant did thereupon write such letter, and delivered it to the plaintiff. The plea lastly averred, that the defendant had not received any consideration for the payment of the bill. Held, on special demurrer, that the plea was repugnant and bad.—*Byas v. Wylie*, 1 C., M. & R. 686; 3 D. P. C. 524.

4. (*Frivolous demurrer.*) Debt against the maker of a promissory note. Demurrer, stating in the margin that the note was not expressed to be for value received: Held, not so frivolous as to warrant its being set aside on motion as irregular, under Reg. Gen. H. T. 4 W. 4, No. 2.—*Cresswell v. Crisp*, 4 Tyrw. 991.

5. (*Plea of general issue in trover.*) Since the new rules, a defendant who pleads the general issue only in trover, admits thereby only that the plaintiff has *some* property in the goods, in respect of which he would be entitled to recover against the defendant; and that admission does not preclude the defendant from showing that he is tenant in common with the plaintiff. If, however, there has been a conversion *in fact*, as by seizure and sale, he must justify such conversion specially by way of confession and avoidance, and cannot, under the general issue, show that he was justified as tenant in common, in committing the conversion *in fact*. Where there has been no actual conversion, but a demand and refusal only, and the defendant claims a lien on the goods, *quare* as to the necessity of pleading the right of lien specially.

The conversion which is put in issue by the plea of not guilty, since the new rules, is a conversion *in fact*, and not merely a *wrongful* conversion; and wherever there has been a conversion in fact, and the defendant insists that such conversion was lawful, he must confess and avoid it by pleading specially the right or title by virtue of which he was justified in the conversion.—*Stancliffe v. Hurdwick*, 2 C., M. & R. 1.

6. (*In debt on bond.—Breach.—Unnecessary issues.*) Debt on bond for the penal sum of 12,000*l.* The condition set forth in the declaration was for the payment of 6000*l.*, *with interest*, and assigned as a breach the non-payment of the 6000*l.* (omitting interest). Plea, that defendant paid the 6000*l.*, *with interest*, according to the form and effect of the condition. Held bad on special demurrer. (1 Saund. 312, *d. (n)*).—*Bishton v. Evans*, 2 C., M. & R. 12.
7. (*Plea of payment into Court.*) *Indebitatus assumpsit* for money had and received, and on an account stated. Plea, as to 25*l.*, parcel &c., that the plaintiff ought not further to maintain his action, because the defendant brings into Court the said sum of 25*l.* ready to be paid to the plaintiff; and the defendant further saith, that the plaintiff has not sustained damage to a greater amount than 25*l.* in respect of the causes of action in the declaration mentioned, *as to the sum of 25*l.**; concluding with a verification. And as to the residue of the monies in the declaration mentioned, the

defendant pleaded the general issue. Held, on special demurrer, that the former plea was bad for not concluding with a prayer of judgment to the further maintenance of the action.—*Sharman v. Stevenson*, 2 C., M. & R. 75.

8. (*Plea of want of consideration.—Evidence admissible under.*) The plaintiff, an auctioneer, sold certain premises to the defendant by auction, and the defendant gave to the plaintiff as a deposit a cheque for 100*l.*; but there being a wilful misrepresentation in the description of the premises, he refused to pay the cheque, and the plaintiff sued him on it. The defendant pleaded that there was no consideration for making the cheque. Held, after verdict for the defendant, that evidence of the wilful misrepresentation was admissible under the plea, but that the plea would have been bad on special demurrer. (3 Coke, 27 *a*; 5 B. & Ald. 88; 1 Saund. 233 *a*, *n*.) —*Mills v. Oddy*, 2 C., M. & R. 103.
9. (*Judgment of non pros.*) To a declaration in *assumpsit* to recover 30*l.*, the defendant pleaded, first, to the whole declaration, payment of 27*l.* into Court, and that the plaintiff had not sustained damage to a greater amount; 2dly, except as to 27*l.*, *non assumpsit*; 3dly, as to 10*l.*, parcel &c., payment of that sum before action brought; 4thly, except as to 27*l.*, a set-off. The plaintiff replied, that he accepted the money paid into Court, and was satisfied. Held, that the defendant was not justified in signing judgment of *non pros* for want of a replication to these pleas.—*Coates v. Stevens*, 2 C., M. & R. 118.
10. (*Departure.*) Declaration in *assumpsit* stated, that by the usage of racing, it was regulated, that in all races to be run for, all stakes for sweepstakes should be made *before the hour of starting* for the first race of the day, and be placed in the hands of the person appointed by the stewards to receive the same; and in default thereof by any person, he should *pay the whole stake as a loser*. The declaration then stated, that, it being so regulated, certain races were appointed to be run, and were run, at L., of which one R. B. was steward, and one J. J. clerk of the races; and that there were at the races certain produce stakes to be run for, &c.; and that a certain filly of the plaintiff and a certain colt of the defendant had been nominated for the stakes; that by a regulation of the races at L., it was provided that all stakes &c. should be paid to the clerk of the races *before eleven o'clock* on the day of running, or the owner *should not be entitled, though a winner*. The declaration went on to allege that the plaintiff had, *before the hour of starting, and before the hour of eleven o'clock* on the day of running, made and paid his stake into the hands of the clerk of the races; that defendant's colt ran, and came in first, and, but for the defendant's default, would have been entitled to the sweepstakes; but that the defendant did not, before the hour of starting for the first race of the day, or before the hour of eleven o'clock on that day, being the day of running, make his stake or pay it into the hands of the clerk of the races; and then averred that the plaintiff's filly did run, and came in second only to defendant's colt, whereby the defendant became liable to pay the whole of the stake, &c.



Plea, that before the defendant had notice of the regulations of the races at L., and *before the hour of starting* for the first race of the day, and before the running of the race for the said sweepstakes, the defendant was ready and willing, and offered to make his stake for his said colt for the said sweepstakes, and then tendered and offered to pay the said stakes into the hands of the said J. J., but that the said R. B. then refused to allow the said J. J. to receive the same, or to allow the defendant's colt to run, on the ground that he was disqualified to run for the said stakes; and that the said J. J. did, in pursuance of such refusal of R. B., refuse to receive the defendant's stake, or to allow the colt to run, on the ground and for the reason aforesaid, and on no other ground whatsoever.

Replication, that the defendant did not tender or offer to make his stake for the said colt for the said sweepstakes, or to pay the same into the hands of the said J. J., until long *after eleven o'clock* on the day of running, &c., although before and at that hour he had notice of the regulation of the said races at L.

On special demurrer, Held, that the replication was ill; that if it was not a departure from the declaration, at all events it did not show any cause of action.—*Lacey v. Umbers*, 2 C., M. & R. 112.

11. (*New rules not applicable to real actions.*) The new rules of pleading are confined to such actions as all the Courts have jurisdiction over, and therefore do not extend to real actions.—*Miller v. Miller*, 3 D. P. C. 408.
12. (*Statement of time in declaration.*) The record in an action of slander stated that the writ issued on the 4th of June, and that the words were spoken on the 27th. Held, that this discrepancy on the record was no ground for arresting the judgment. (7 T. R. 474.)—*Steward v. Layton*, 3 D. P. C. 430.
13. (*Variance.*) The declaration in the commencement stated that the defendant was summoned to answer the plaintiff, assignee of the sheriff of Middlesex; but the bond declared on appeared to be made to the plaintiff personally. The declaration was held good on special demurrer.—*Reynolds v. Welch*, 3 D. P. C. 441.
14. (*Pleading issuably.—Replying double.*) Where a defendant is under terms to plead issuably, the plaintiff cannot reply double; and if he do, the Court will give the defendant leave to assign it as cause of demurrer, and will allow it to be argued.—*Gisborne v. Wyatt*, 3 D. P. C. 505.
15. (*Inconsistent pleas.*) It is not of itself any objection to pleas that they are inconsistent.—*Wilkinson v. Small*, 3 D. P. C. 584.
16. (*General issue in case, proof under.*) The defendant cannot now, under the plea of not guilty in an action on the case, raise any objection as to defective proof of the inducement in the declaration.—*Duke v. Gostling*, 3 D. P. C. 619.
17. (*Non assumpsit, proof under.—Illegality of contract.*) Under the new rules, the illegality of work and labour done cannot be given in evidence under non-assumpsit, although the illegality be not merely inferential, but essential to the contract.—*Potts v. Sparrow*, 3 D. P. C. 630.

18. (*Illegality of contract.*) If a good cause of action at common law appear in the declaration, the defendant must, under the new rules, plead specially any statutable illegality in the contract on which it is founded.—*Barnett v. Glossop*, 3 D. P. C. 625.

And see BANKRUPTCY, 3; BILL OF EXCHANGE, 5; EVIDENCE, 1; FRAUDS, STATUTE OF, 1; PROMISSORY NOTE, 4; TRESPASS, 1, 2, 3, 5.

#### POOR-RATE.

1. (*Rateability of navigation.*) A local act, by which a company was empowered to make a river navigable, and to make new cuts through the adjoining lands, enacted, that the company "should not be taxed or assessed for the navigation, or the profits thereof, at any place except the towns of A. & B." where account books were directed to be kept. Held, that these words created an exemption from poor-rates in respect of lands taken for the purpose of the act, elsewhere than in A. & B.; and that, although no part of the navigation was within the town of A.

By a subsequent act, after reciting that it would be advantageous to abandon the existing navigation in certain parts, and to make new cuts in lieu thereof, and empowering the company to make certain new cuts, and to receive additional tolls in consequence thereof, it was enacted that the cuts should, when made, be considered and taken as *part of the navigation of the river*, and that all the provisoes, directions, restrictions, penalties, and forfeitures in the former acts, respecting the boatmen employed on the said river, the owners, commanders &c., of boats &c., or other persons employed thereon, or in any other respect relating to or for the benefit or protection of the said navigation, and all other powers and authorities therein contained, should extend and be applicable to the said cuts &c., as fully in every respect as if the said cuts, &c. had originally been part of the river navigation, and had been inserted in the several acts. Held, that the company were *exempt from poor-rates* in respect of land, not in A. or B., taken by them under the powers of this act, and used for cuts in lieu of parts of the old navigation.—*The King v. Inhabitants of Barnby Dun*, 4 N. & M. 436.

2. (*Rateability under local act.*) By a local act for the government of a parish, collectors of the rents of houses, &c. within the parish, the *yearly valuation or assessment* whereof respectively should be less than 30*l.* were made liable to be rated, and compellable to pay the rates in respect of such houses, &c. *Semble*, that the liability of the collector would extend only to cases in which the rental, and not the *assessment* merely, of the houses, &c. was under 30*l.*—*Rex v. Hall*, 4 N. & M. 546.
3. (*Notice of appeal—Distress.*) An increased poor-rate having been assessed on certain premises, an appeal against it was entered at the next sessions, and there respited, but no notice in writing was given of that appeal to the overseers, under 41 G. 3, c. 23, s. 2. Before the hearing of the appeal, the overseers distrained for the increased rate; the amount was paid under protest, and the possession of the distress was thereupon relinquished. The rate was afterwards reduced by the sessions in con-

sequence of a decision of the K. B. An action being brought by the rate-payers against a person who was overseer at the time of the distress, to recover the surplus as money had and received by him to their use: Held that, for want of the notice of appeal, the action would not lie. (4 B. & Ad. 342.)—*Priestley v. Watson*, 4 Tyrw. 916.

And see *MAGISTRATE*.

### PRACTICE.

1. (*Time of swearing affidavits in support of rule.*) On the statement of counsel that he had moved for a rule, which he obtained the day before, on a mistaken supposition that an affidavit deposing to certain facts had been sworn, the Court allowed the rule to be drawn up on reading such affidavit, on condition that it should be sworn on that same evening.—*Perring v. Kymer*, 4 N. & M. 477.
2. (*Proceedings on reference to master.*) The master, on a reference to him of certain matters connected with a cause, cannot receive *vivâ voce* evidence, unless specially authorized so to do by the rule of reference or a judge's order: which order may be made pending the reference.—*Noy v. Reynolds*, 4 N. & M. 483.
3. (*Taking office copies of affidavits.*) A party who had obtained a rule nisi, which was afterwards enlarged on the terms of filing the affidavits in answer before a certain day, was permitted to move to make his rule absolute, although he had omitted to take office copies of such affidavits.—*Pitt v. Coombs*, 4 N. & M. 535.
4. (*Attachment.—Waiver of personal service.*) Where a party appeared to show cause against issuing an attachment for disobeying a judge's order, which had been made a rule of Court, and objected that the rule nisi had not been personally served (which was the fact): Held that such appearance waived the necessity of a personal service.—*Levi v. Duncombe*, 1 C., M. & R. 737; 3 D. P. C. 447.
5. (*Irregularity.—Not appearing by attorney.*) Irregularity in appearing by a person who is not an attorney of the Court, does not authorize the opposite party to sign judgment, but only to move to set aside the proceedings.—*Basley v. Thompson*, 4 Tyrw. 955.
6. (*Demurrer books.*) Where the defendant had neglected to deliver his demurrer books, and did not appear at the argument to support his pleadings, but offered to give a cognovit, the Court gave judgment for the plaintiff, without requiring him to deliver demurrer books for the defendant.—*Scott v. Robson*, 2 C., M. & R. 29.
7. (*Power of judge to nonsuit.*) Where a jury cannot agree in their verdict, they must either be discharged or directed to deliberate further. The judge cannot direct a nonsuit without the plaintiff's consent. A plaintiff can in no case be nonsuited against his will. And where liberty is reserved to move to enter a nonsuit on a particular objection, such reservation proceeds upon the assent to it, express or implied, of both parties. And if,

after such reservation, the cause proceeds, and is left to the jury, the judge cannot direct a nonsuit without the plaintiff's further assent.—*Dewar v. Purday*, 4 N. & M. 633.

8. (*Service of rule.*) Service of a rule nisi to compute on the defendant's landlady is not sufficient.—*Gardner v. Green*, 3 D. P. C. 343.
9. (*Judgment as in case of nonsuit.*) In an action for a malicious arrest, the Court discharged a rule for judgment as in case of a nonsuit, with costs, where the plaintiff showed that he only forbore proceeding to trial because the defendant had instituted criminal proceedings against him on the charge for which the arrest was made.—*Grey v. Hutchins*, 3 D. P. C. 414.
10. (*Staying proceedings.*) A defendant who moves to stay proceedings on payment of debt and costs, is not entitled to a rule for that purpose as a matter of right, but must submit to such reasonable terms as the Court in their discretion may think proper to grant.—*Jones v. Shepherd*, 3 D. P. C. 421.
11. (*Affidavit of merits.*) An affidavit to set aside a regular judgment, made by the London agent to the country attorney, and stating that the deponent believed, from the instructions received from the country attorney, that the defendant had a good defence to the action on the merits, held sufficient.—*Schofield v. Huggins*, 3 D. P. C. 427.
12. (*Staying proceedings.*) Proceedings were commenced on a bill of exchange against the drawer, and also against the defendant as acceptor; the drawer paid the bill and costs, and the bill was delivered up to him, and notice was given to the defendant that proceedings against him were abandoned. His costs, however, were not paid, and as he disputed his liability as acceptor, he ruled the plaintiff to declare, who then applied to a judge to stay proceedings, and obtained an order for that purpose. The Court set the order aside.—*Lewis v. Dalrymple*, 3 D. P. C. 434.
13. (*Service of declaration.*) Where the defendant's residence is unknown, application must be made to the Court, in the first instance, for leave to serve the declaration in a particular manner; and if the declaration is left at the defendant's last place of abode, the Court will not afterwards declare such service to be good.—*Troughton v. Craven*, 3 D. P. C. 436.
14. (*Time for taking advantage of irregularity.*) A writ was served on the 25th of October. On the 3d of November (the 2d being Sunday) an application was made to set aside the service for irregularity. Held too late; it should have been made on the 1st.—*Tyler v. Green*, 3 D. P. C. 439.
15. (*Frivolous demurrer.*) A rule nisi for setting aside a demurrer as frivolous, should be drawn up on reading the pleadings, otherwise the Court cannot look at the record.—*Howorth v. Hubbersty*, 3 D. P. C. 455.
16. (*Joinder in demurrer—Costs.*) A defendant having demurred to a replication, the plaintiff got the case put into the paper as for argument, and

the defendant came prepared to argue the point; but it appeared that the plaintiff had not joined in demurrer, and of course no demurrer books were delivered. Held, that the defendant was not entitled to his costs of appearing for argument.—*Howorth v. Hubbersty*, 3 D. P. C. 457.

17. (*Staying proceedings.*) Where the action was brought by a trustee, and there were circumstances of suspicion in the case, the Court stayed proceedings on payment of the debt into Court, and on payment of costs; leaving the plaintiff to apply subsequently to have his extra costs out of the fund in Court.—*Jones v. Bramwell*, 3 D. P. C. 488.
18. (*Entering causes at Yorkshire assizes—New trial.*) At the York assizes the causes are entered by the marshal in two lists, one for the East and one for the West Riding. A cause having, by mistake, been entered in the wrong list, was tried as an undefended cause, the defendant's attorney having searched the right list without finding it. The Court held that he was not bound to search both lists, and granted a new trial.—*Hunter v. Hornblower*, 3 D. P. C. 491.
19. (*Frivolous demurrer.*) Where a defendant pleaded a frivolous demurrer so late in the term that there was not time to set it down for argument, and a motion was made to set it aside, the Court would only let the defendant in to plead on an affidavit of merits, pleading *instante*, and paying the costs of the demurrer, and of the application.—*Underhill v. Hurney*, 3 D. P. C. 495.
20. (*Staying proceedings.*) The Court will stay proceedings if it appears doubtful whether the action is brought with the knowledge and consent of the plaintiff.—*Doe d. Baker v. Roe*, 3 D. P. C. 496.
21. (*Notice to produce record.*) On an issue of *nul tiel record*, the plaintiff gave the defendant notice to produce the record, and on his neglect to do so, moved for judgment. The Court held the notice to be irregular (a four-day rule being necessary), and refused the rule.—*Begbie v. Grenville*, 3 D. P. C. 502.
22. (*Declaring within a year.*) Where the plaintiff's proceedings on a writ of summons were stayed by rule, he was held bound to declare within a year after the expiration of that rule.—*Unite v. Humfrey*, 3 D. P. C. 532.
23. (*Returning demurrer book, in sci. fa.*) It is not necessary for a party in a *sci. fa.* to return the demurrer book; and therefore a judgment signed for not returning it is irregular.—*Baylis v. Hayward*, 3 D. P. C. 533.
24. (*Signing judgment for want of plea—Computation of time.*) A plaintiff cannot sign judgment for want of a plea before the time for pleading is out, though a bad plea may have been delivered. *Semble*, that the word "till" is inclusive of the day to which it is prefixed.—*Dakins v. Wagner* 3 D. P. C. 535.
25. (*Judgment of non pros.*) Though a defendant is under terms to rejoin *gratis*, and take short notice of trial, the plaintiff cannot sign judgment of

non pros, for want of a rejoinder, unless a demand for that purpose has been made. (3 B. & P. 443.)—*Seaton v. Skey*, 3 D. P. C. 537.

26. (*Staying proceedings in action until trial of indictment.*) In an action commenced by bailable process, the Court will not stay proceedings until after the trial of an indictment for perjury founded on the plaintiff's affidavit of debt. (4 East, 572.)—*Johnson v. Wardle*, 3 D. P. C. 550.
27. (*Signing judgment before appearance—Waiver.*) An interlocutory judgment signed without an appearance entered, is a nullity, and cannot be waived.—*Roberts v. Spurr*, 3 D. P. C. 551.
28. (*Rule to plead—Waiver.*) Taking out a summons for time to plead is a waiver of a rule to plead.—*Nugee v. M'Donell*, 3 D. P. C. 579.
29. (*Plea of pendency of action in different Court.*) If a defendant non proesses a plaintiff in a particular action, he cannot afterwards plead its pendency in answer to an action for the same cause in another Court.—*Pepper v. Whalley*, 3 D. P. C. 579.
30. (*Setting aside proceedings—Statute of limitations.*) The fact of the statute of limitations having, on the plaintiff's own shewing, run since the debt accrued, is no ground for setting aside the plaintiff's proceedings.—*Pottier v. Macdonel*, 3 D. P. C. 583.
31. (*Defendant's discharge on payment of debt and costs.*) If the debt and costs in an action are paid to the plaintiff, no matter by whom, the defendant is entitled to be discharged out of custody.—*Rimmer v. Turner*, 3 D. P. C. 601.
32. (*Rule for certiorari.*) A rule for a *certiorari* to remove a record from an inferior jurisdiction, is absolute [in the first instance].—*Pawsey v. Gooday*, 3 D. P. C. 605.
33. (*Service of notice of declaration.*)—Where a strong probability appeared that the notice of declaration had come to the defendant's hands, and he did not deny that it had come to his knowledge, the Court refused to set aside the judgment signed for want of a plea.—*Rolfe v. Brown*, 3 D. P. C. 628.
34. (*Admission of documents—Authority of Judge at chambers.*) A judge at chambers only has authority, under rule 20, H. T. 4 W. 4, to direct the admission of documents; but if he desires parties coming before him on such a rule, to go before the Court, the Court will hear them, not pronouncing any judgment, but communicating their opinion to the judge, and leaving him to give judgment at chambers.

On the plaintiff paying the defendant the expenses of examining documents abroad, an order was made for the defendant to pay the expense of proving them at the trial, whatever might be the result of the case, if

after such examination the defendant did not admit them.—*Smith v. Bird*, 3 D. P. C. 641.

And see ATTORNEY; BAIL; COSTS; EJECTMENT; INTERPLEADER ACT; PLEADING; PROCESS, &c.

### PRINCIPAL AND AGENT.

(*Liability of agent for negligence—Cross action.*) The defendant, an auctioneer, was employed by the plaintiff to sell furniture, and was desired to sell it for ready money only. The defendant, however, sold it to M. on his giving him a bill for the amount, drawn by himself on, and accepted by, one D. The plaintiff afterwards applied for payment of the amount of the sale, and the bill, though at first refused to be taken by the plaintiff, was ultimately taken by an agent of his, in order to get it discounted. The bill never was presented, nor was any notice of dishonour given either to M. or the defendant, until ten days after the bill had become due. In an action brought against the defendant for negligence, in selling the furniture otherwise than for ready money, the jury found that the plaintiff had not accepted the bill in satisfaction for the furniture. Held, that the plaintiff's negligence in not presenting the bill, and not giving notice of dishonour, by which M. was discharged from liability on the bill, was no answer to the action, although the defendant might perhaps maintain a cross action against the plaintiff to recover such damages as he could prove he had sustained by reason of any of the parties to the bill being discharged through the negligence of the plaintiff.—*Earl Ferrers v. Robins*, 2 C., M. & R. 152.

And see HUSBAND AND WIFE.

### PRISONER.

1. (*Discharge of small debtor.*) Though the judgment is in debt for 100*l.* yet if the execution against the defendant is for less than 20*l.* he may be discharged out of custody after 12 months' imprisonment, without reducing the judgment.—*Harris v. Parker*, 3 D. P. C. 451.

2. (*Charging in execution.*) Where a defendant has been taken in execution on a *ca. sa.*, and he afterwards removes himself into the custody of the marshal, the plaintiff is neither obliged to carry in the roll, nor to charge him in execution.—*Deemer v. Brooker*, 3 D. P. C. 576.

And see BAIL, 5.

### PROCESS.

1. (*Indorsement on—Time for setting aside—Return of writ.*) A *capias* to outlawry, sued out by the plaintiff in person, was indorsed thus:—"This writ was issued by C. L., No. 6, &c." (instead of "who resides at," according to the form of the statute). It was filed on the 4th of June, and might have been seen by the defendant at any time afterwards in the office: Held, (on motion to set aside the proceedings to outlawry) that it was too late in Michaelmas term to take advantage of this objection, even if it were maintainable, though it was sworn that the defendant did not know of the outlawry till six weeks before: Held also, that it was

at most a mere irregularity, the objection to which ought to have been taken by summons at chambers.

The writ was issued April 17th, and returned *non est inventus* on the 4th June, the practice being that it could not be returned within four months, except under a judge's order: Held, that this was no objection to the writ itself, as it was not necessary to state the judge's order in it; and that it must be assumed it was done correctly.—*Lewis v. Davison*, 1 C., M. & R. 655.

2. (*Form of capias.—Indorsement.*) The omission of the letter "s" in the word "she," in the copy of the writ served on the defendant, was held to be immaterial, as it could not mislead. (1 Bing. N. C. 245.)—The indorsement ran—"if the amount thereof be paid within four days from the arrest or service hereof:" Held sufficient, and that the words "arrest or" might be rejected as surplusage.—*Sutton v. Burgess*, 1 C., M. & R. 770; 3 D. P. C. 489.
3. (*Concurrent writs.*) Two writs of *ca. sa.* were issued at one time into Anglesea and Carnarvonshire. The debtor was arrested in Anglesea on 1st November, paid the debt and costs to the *sheriff*, and was discharged. The next day he was arrested on the other *ca. sa.* in Carnarvonshire, and detained in custody till the 15th, when the debt and costs were paid over to the creditor's attorney, who had been acquainted with the facts some days earlier, but not before the second arrest. The debtor sued the creditor and her attorney in case, for malicious non-feasance, in not giving notice to the sheriffs of Carnarvonshire that the writ issued into Anglesea had been executed and the judgment satisfied, and that the writ issued to him ought not to be executed. The jury found that the detention till the 15th was not malicious. There was no proof of any application by the debtor for a countermand of his imprisonment: Held, that the plaintiff could not recover: and also, that the discharge by the sheriff of Anglesea, without the creditor's consent, was a voluntary escape. (1 B. & P. 388; 14 East, 468; 4 B. & C. 26; 2 B. & P. 129; 3 East, 314.)—*Lewis v. Morris*, 4 Tyrw. 907.
4. (*Form of writ of summons.*) The addition of the defendant need not be inserted in the writ of summons. It is sufficient to state his residence.—*Morris v. Smith*, 2 C., M. & R. 120.
5. (*Second arrest.*) A defendant was arrested for 70*l.*, but as it appeared that he had a defence under the statute of limitations to part of that amount, it was agreed that he should be discharged out of custody on giving a bill for 30*l.*, drawn by a third party and accepted by himself. The defendant having been again arrested on the bill: Held, that he was not entitled to his discharge on the ground of having been a second time arrested for the same debt.—*Hamber v. Cooper*, 2 C., M. & R. 148.
6. (*Indorsement on writ—Amendment of.*) A judge at chambers has no power, under the 3 & 4 W. 4, c. 42, to amend the indorsement on a writ of summons, by reducing the amount of the claim indorsed, in



order that the cause may be tried before the sheriff.—*Trotter v. Bass*, 3 D. P. C. 407.

7. (*Indorsement.*) A writ indorsed "M. & Co., agents for S.," without specifying the Christian names, held sufficient.—*Pickman v. Collis*, 3 D. P. C. 429.
8. (*Amendment of.*) A mistake in a *ca. sa.* in stating the amount recovered was allowed to be amended after execution, on payment of costs.—*Arnell v. Weatherby*, 3 D. P. C. 464.
9. (*Misnomer, waiver of objection to.*) A defendant waives an objection of misnomer in the writ, by taking out a judge's order wherein he uses the name by which he was arrested.—*Nathan v. Cohen*, 3 D. P. C. 370.
10. (*Contempt of, what is.*) Merely snatching an original writ of summons with violence from the party serving the copy, is not a contempt of the process of the Court.—*Weekes v. Whitely*, 3 D. P. C. 536.
11. (*Indorsement of capias.*) "Southampton Buildings" is not a sufficient description of the attorney's residence, in the indorsement on a *capias*. But the defendant was not permitted to avail himself of the objection two months after the arrest.—*Rust v. Chine*, 3 D. P. C. 565.
12. (*Distingas.*) The Court refused a *distingas* on an affidavit merely stating the defendant to be absent in Ireland, without showing that he had gone to avoid his creditors, though he had a residence in town at which unsuccessful attempts to serve him had been made.—*Evans v. Fry*, 3 D. P. C. 581.
13. (*Special return to capias.*) *Semble*, that where one sheriff has made a special return to a writ of *capias*, the Court will not compel his successor to make another, the circumstances remaining unaltered.—*Pasmore v. Wilkinson*, 3 D. P. C. 635.

And see LIMITATIONS, STATUTE OF, 5; OUTLAWRY.

#### PROMISSORY NOTE.

1. (*Admissibility of parol evidence to vary.*) Parol evidence is not admissible to show that a note, on the face of it payable fourteen days after date, was not to be paid in case a verdict was obtained in an action brought between other parties. (10 B. & C. 729; 3 B. & A. 235; 1 Stark. 361.)—*Foster v. Jolly*, 1 C., M. & R. 703.
2. (*Parol evidence—Failure of consideration.*) A. put a sum of 400*l.* into the hands of B., his solicitor, who laid it out on mortgage, and the deeds were deposited with A. The interest being in arrear, and A. pressing for payment, B. gave a promissory note payable to A. three months after date, for the amount of the principal and interest, and it was agreed at the time of giving the note, that A. should deliver up the deeds to B., and should hold the note until the sale of the mortgaged property should be completed. When the note became due, A. sued B. upon it, although the deeds had not been delivered up, or the sale of the mortgaged premises been completed. The judge left it to the jury to say whether the note was given on a condition precedent that the deeds should be delivered up: Held, that it ought to have been left to them to

say what the consideration of the note was, and whether it had wholly failed or not.—*Richards v. Thomas*, 1 C., M. & R. 772.

3. (*Proof of consideration, on whom.*) In an action on a promissory note, the defendant pleads that there was no consideration for the note; the plaintiff replies that there was a good consideration. The issue is on the defendant to show that the note was given by way of accommodation and without value.—*Lacey v. Forrester*, 2 C., M. & R. 59.
4. (*Plea of want of consideration.*) In assumpsit on a promissory note by payee against maker, the defendant pleaded that he made the note without any value or consideration whatever for his so doing, or for his paying the amount, or any part thereof: Held, on special demurrer, that the plea was bad. (1 C., M. & R. 798.)—*Stoughton v. Earl of Kilmorey*, 2 C., M. & R. 72.

#### SET-OFF.

A defendant can only set off debts which were due to him from the plaintiff as well at the time of action brought as at the time of plea pleaded. Therefore, a plea of set-off on a bill of exchange, payable to the defendant's order and accepted by the plaintiff, is not supported by proof or a bill answering to the description in the plea, which at the time of action brought was in the hands of a third party, although before plea pleaded it had got back into the defendant's hands.—*Braithwaite v. Coleman*, 4 N. & M. 654.

#### SETTLEMENT.

1. (*By renting—Divided occupation.*) Since the passing of the 1 W. 4, c. 18, no settlement can be gained by the renting and occupation of a tenement by a party who allows an under-tenant to have the exclusive occupation of any portion of the tenement, for however short a period such occupation may continue, and however small may be the sum paid in consideration of it. (5 B. & Ad. 219.)

Sect. 1 of that statute, though prospective only, applies to cases in which the occupation had commenced, but was not complete, at the time of the passing of the act. (4 B. & Ald. 681.)—*The King v. Inhabitants of St. Nicholas, Colchester*, 4 N. & M. 422.

2. (*Contract of service—Volunteer.*) A person inrolled as a member of a volunteer corps, is not *sui juris* so as to be able to make a valid contract of service for a year. (Burr. S. C. 753; 1 Dowl. 391; 3 M. & S. 229.)

And it is not necessary, in order to make a man inrolled as a volunteer an effective member of his corps, that he should have taken the oath of allegiance required by the Volunteer Act, 44 G. 3, c. 54, s. 20.—*The King v. Inhabitants of Witnesham*, 4 N. & M. 447.

3. (*By Estate.*) A., B., C., and D., are next of kin to an intestate. A. takes out administration, and then all four join in a mortgage of a leasehold tenement formerly the property of the intestate, and divide between them the money advanced. B. afterwards verbally agrees with C., in consideration of a sum of money then paid, to sell him all his interest in the tenement, and, after a lapse of some time, joins A. & D. in a release

of all their interest to C.: Held, that B. did not, by residence in the parish wherein the tenement was situated, for 40 days between the making of the agreement and the execution of the release, gain a settlement by estate in that parish.—*The King v. Inhabitants of Cregina*, 4 N. & M. 455.

4. (*By apprenticeship—Payment of premium by public charity—Stamp.*) A. was apprenticed for seven years to B., a tinman, by the trustees of a charitable fund, and the premium paid out of that fund. He served B. three years, when, at his request, B. verbally, and without the trustee's knowledge, consented that A. should serve the rest of his time with C., a plumber, and agreed to give C. 6*l.* as part of the 15*l.* paid as a premium on the binding of A., for taking him: Held, that the 6*l.* was not a consideration paid by the public charity, but that the transfer to C. was in the nature of a new binding out, and was void for want of a stamped assignment, under the 55 G. 3, c. 184.—*The King v. Inhabitants of Fakenham*, 4 N. & M. 553.

5. (*By office.*) An act of parliament authorized the justices of the county of Chester to appoint constables for townships for such period as the said justices should think expedient. A person appointed to one of these offices, who served it for a year, was held not to gain any settlement; for it could not be deemed an annual office, although the salary was regulated according to a stated annual amount.—*The King v. Inhabitants of Middlewich*, 4 N. & M. 682.

6. (*Exceptive hiring.*) A hiring, under which the servant was to work ten hours a day, from five in the morning till six in the evening, leaving off in the middle of Saturday, so as to make up the ten hours a day,—held to be an exceptive hiring. (9 B. & C. 925; 2 B. & C. 114; 4 B. & Ad. 216.)—*The King v. Inhabitants of Norton-Bavant*, 4 N. & M. 687.

7. (*By office.*) A party was appointed pinder for the town of F., at a Court held within and for a manor not extending over the whole town. There was no special custom warranting such appointment: Held, that he gained no settlement, by the execution of such office, in the parish of F., with which the town was co-extensive.—*The King v. Inhabitants of St. Mary, Newmarket*, 4 N. & M. 693.

#### SHERIFF.

(*Return of fi. fa. by.*) A sheriff was, under special circumstances, compelled to return a writ of *fi. fa.*, though he had been three years out of office, and had, by leave of the Court, withdrawn from the possession of the property seized.—*Wilton v. Chambers*, 3 D. P. C. 333.

And see EXECUTION IN CRIMINAL CASES; INTERPLEADER ACT.

STAMP. See SETTLEMENT, 4.

TAXES. See DISTRESS, 1, 3.

#### TRESPASS.

1. (*Pleadings—Replication de injuriis—Excess.*) To trespass for assault and

false imprisonment, the defendant pleaded that he was in lawful possession of a house, and that the plaintiff was unlawfully therein, and had been requested to depart, but had refused, whereupon the defendant gently laid his hands on him to remove him; that thereupon the plaintiff assaulted him in the presence of a policeman, *wherefore* he caused him to be taken to a police office. Replication, *de injuriâ*. The defendant proved all the matters of the plea, except the assault by the plaintiff: Held, that the plaintiff was entitled to damages for the imprisonment, and was not bound to have replied excess.—*Reece v. Taylor*, 4 N. & M. 469.

2. (*Pleadings—Description of close.*) In a declaration *qu. cl. fr.*, the plaintiff's close is described by *abuttals*. Plea, seisin in fee in the defendant, and issue thereon. The plaintiff is entitled to recover for a trespass done in a close in his lawful possession, answering to the description in the declaration, although the defendant has also a close answering to the same description. And that, even where the abuttals are stated with such generality that the declaration would have been bad on special demurrer, and it is only by reason of such generality of description that the plaintiff's close comes within the description: as where the *locus in quo* was described as abutting, in the direction of the *four* cardinal points, *towards* certain closes, and the plaintiff proved a trespass on a close of a *triangular* shape abutting *towards* such closes. (1 B. & C. 489; 9 D. & R. 495.)—*Lempriere v. Humphrey*, 4 N. & M. 638.
3. (*Right of private person to give affrayers into charge of constable—Pleadings.*) Trespass for assault and false imprisonment, and taking plaintiff to a police-station. Plea, that defendant was possessed of a dwelling-house, and that plaintiff entered the dwelling-house, and made a great disturbance and affray therein, and insulted, abused, and ill-treated the defendant and his servants therein, and greatly disturbed them in the peaceable possession thereof, in breach of the peace; whereupon the defendant requested the plaintiff to cease his disturbance, and depart out of the house, which the plaintiff refused to do, and continued in the house making the said disturbance and affray therein; that thereupon the defendant, to preserve the peace, and restore good order in the house, then and there gave charge of the plaintiff to a policeman, &c., and the policeman took him into custody and conducted him out of the house to the police-station, for examination, and to be dealt with according to law.

The facts proved were these:—The plaintiff entered the defendant's shop to purchase an article, when a dispute arose between him and the defendant's shopman: the plaintiff refusing on request to leave the shop, the shopman endeavoured to turn him out, and an affray ensued between them: the defendant came into the shop during the affray, which continued for a short time after he came in; the defendant then requested the plaintiff to leave the shop quietly, but he refusing to do so, the defendant gave him in charge to a policeman, who took him to the station house.

Held, first, that these circumstances justified the defendant in giving the plaintiff into custody, to prevent a renewal of the affray. But,

Secondly, that the plea was not substantially proved, inasmuch as the alleged assault on the defendant himself, which was the only breach of the peace which appeared by necessary implication from the plea to have been committed in the defendant's presence, was not proved.—*Timothy v. Simpson*, 1 C., M. & R. 757.

4. (*Irregular process of outlawry*.) Trespass for false imprisonment. The defendant justified under process of outlawry. The plaintiff replied that there was no affidavit of debt made and filed, &c., and the defendant rejoined that there was such affidavit, and set out an *irregular* affidavit. The plaintiff demurred: Held, that the defendant was entitled to judgment, trespass not being maintainable where the process is *irregular* merely, and not void.—*Riddell v. Pakeman*, 2 C., M. & R. 30.
5. (*Justification—Several assaults*.) Where a plea justified two assaults (the declaration having charged only one) and no evidence was given of the second assault mentioned in the plea, and the jury found for the defendant: Held, that as it was unnecessary to have justified a second assault, it was unnecessary to prove it.—*Atkinson v. Warne*, 3 D. P. C. 483.

#### TROVER.

1. (*For stolen goods—Sale in market-overt*.) The owner of stolen goods, who has prosecuted the thief to conviction, is entitled to recover the value of them in trover from a person who purchased them from the thief, not in market-overt, and who resold them in market-overt after notice of the felony but before conviction. (5 T. R. 175; 1 Hale, P. C. c. 45, p. 546; 2 T. R. 750.)—*Peer v. Humphrey*, 4 N. & M. 430.
2. (*Statute of limitations—Conversion beyond six years*.) Where, in trover by bailor against bailee, the defendant pleads the statute of limitations, it is not sufficient for him to prove acts done more than six years before action brought, which the bailor *might*, at *his option*, have treated as acts of conversion; he must prove clear unequivocal acts of adverse ownership. Thus, where in trover for wine and bottles, the plaintiff showed that more than six years before action brought he deposited a pipe of wine and some bottles with the defendant, it was held that the defendant did not support a plea of the statute of limitations merely by showing that the wine was *bottled* while in his cellar, and a part of it *drunk*, more than six years before action brought.—*Philpott v. Kelley*, 4 N. & M. 611. And see PLEADING, 5.

#### USURY.

- (*Proof of day on which contract made*.) In debt *qui tam* for penalties for usury in renewing and discounting of bills, it is necessary to prove that the usurious contract was entered into on the precise day which is laid in the declaration, even though it be laid under a *videlicet*. (R. & M. 153.)—*For v. Keeling*, 4 N. & M. 523.

**VENDOR AND PURCHASER.**

(*Entry of contract by auctioneer's clerk.—Recovery of deposit, &c.*) On a sale of lands by auction, a written contract was signed by the purchaser, whose signature was attested by the auctioneer's clerk, thus:—"Witness, J. N." The clerk also signed a receipt for the deposit and a moiety of the auction duty, and afterwards paid over the deposit to the vendor, whose attorney subsequently wrote to the attorney for the purchaser that they could not make out a marketable title, and that they advised the purchaser to relinquish his purchase: Held, that the vendor was not bound by the contract: Held also, that the deposit-money and moiety of the duty might be recovered back by the purchaser; but not the expenses of investigating the title, nor interest on the deposit. (9 Ves. 234; 4 Bing. 723; 1 D. & R. 32; 4 Taunt. 334.)—*Gosbell v. Archer*, 4 N. & M. 485.

**VENUE.**

1. (*Bringing back, in libel.*) In an action for a libel, the venue was laid in London, and the defendant moved to change it to Lincoln on the usual affidavit; and on a rule being obtained to bring it back, it appeared from the affidavit that the libel had been published in London as well as in Lincoln: Held, that the plaintiff was entitled to have the venue brought back to London, without entering into an undertaking to give material evidence there.—*Clements v. Newcome*, 1 C., M. & R. 776; 3 D. P. C. 425.
2. (*Changing, in local action.*) *Semble*, that the venue may now be changed in a local action. (3 & 4 W. 4, c. 42, s. 22.)—*Briscoe v. Roberts*, 3 D. P. C. 434. [The act seems, however, to do no more than authorize a direction that the issue may be tried in another county, which before could only have been done, in general, by consent.]

**WARRANT OF ATTORNEY.**

1. (*Entering up judgment.—Title of affidavit.*) An affidavit in support of a motion to enter up judgment on a warrant of attorney, given when no suit is pending, need not be entitled in any cause.—*Davis v. Stanbury*, 3 D. P. C. 440.
2. (*Entering up judgment.*) Since the rules of H. T. 4 W. 4, (s. 1, rule 3,) it is not necessary, in order to sign judgment on an old warrant of attorney, to show that the defendant was alive *within the term*. (2 D. P. C. 816.—*Robinson v. Lester*, 3 D. P. C. 531.)

**WARRANTY.**

(*Of horse.*) Where an unsound horse is sold with a warranty of soundness, the buyer may sue on the warranty, although shortly after the sale he discovers the unsoundness, and without giving notice of that fact to the seller, keeps and uses the horse as his own for months, and during that time administers physic to it, and uses other means to cure it. (1 H. Bl. 17; 1 C. & M. 207.)—*Patteshall v. Tranter*, 4 N. & M. 650.

Weights and Measures Act. See **ILLEGAL CONTRACT.**

WILL. See EVIDENCE, 4.

### WITNESS.

1. (*Recalling.*) It is in the judge's discretion whether he will allow a witness to be recalled.—*Adams v. Bankart*, 1 C., M. & R. 681.
2. (*Incompetency of, as party to suit.*) Where a local act empowered the directors and overseers of the poor of a parish to sue and be sued in the name of their clerk: Held, in an action for goods supplied to the directors, that a person who was a director when the goods were supplied was a competent witness for the defendant.—*Fletcher v. Greenwell*, 1 C., M. & R. 754.
3. (*Attachment for disobedience to subpoena.*) In order to subject a witness to an attachment for disobeying a subpoena, it must appear that he was called upon it.—*Rex v. Stretch*, 3 D. P. C. 378. [In *Dixon v. Lee*, 1 C., M. & R. 646, the Court of Exchequer intimated the contrary; and see *Barrow v. Humphrey*, 3 B. & A. 598, which was cited in the principal case, but apparently disregarded by the learned judge, Patteson, J.]
4. (*Same.*) A rule for an attachment for disobeying a subpoena will not be granted, where it is clear that the witness's presence on the trial would have been of no use to the party subpoenaing him.—*Dicas v. Lawson*, 3 D. P. C. 427.
5. (*Same.*) A rule for an attachment against a witness was discharged with costs, it being denied that the original subpoena was shown at the time of service.  
No conduct money need be tendered to a witness in a town cause.—*Jacob v. Hungate*, 3 D. P. C. 456.
6. (*Examination of witnesses in India.*) Under the 1 W. 4, c. 22, the Court has power to issue a mandamus for the examination of witnesses in India, wherever the cause of action arose.—*Bain v. De Veltry*, 3 D. P. C. 516.
7. (*Attendance of witnesses—Calling on subpoena.*) A witness must attend in Court himself pursuant to his subpoena; it is no excuse for his non-attendance that he employed a person to watch the proceedings of the Court, who neglected to give him notice in due time.  
It is not indispensably necessary that when a witness is called on his subpoena, the officer of the Court should hold the writ in his hand; it is sufficient for the writ to be exhibited in Court, and the officer to call him three times.—*Rex v. Fenn*, 3 D. P. C. 547.
8. (*Examination of witnesses abroad.*) On an application by the defendant for a commission to examine witnesses abroad, the Court refused to make it a part of the rule to call upon the plaintiff to produce, at the time of executing the commission, a bill of exchange in his possession.—*Cunliffe v. Whitehead*, 3 D. P. C. 634.

And see COSTS, 6.

## WRIT OF TRIAL ACT.

1. (*New trial.*) In a cause decided by the sheriff, &c. on a writ of trial, the Court will hear a motion for a new trial on the ground that the verdict was against evidence, though the damages were under 20*l.* (5*l.* is now fixed as the limit.)—*Taylor v. Helps*, 5 B. & Ad. 1068.
2. Neither party is entitled to the sheriff's notes for the purpose of moving for a new trial.—*Vickers v. Cock*, 3 D. P. C. 492. And, under special circumstances, the Court will not, on such motion, require the production of the sheriff's notes, if the motion be made by counsel who were engaged at the trial. (2 D. P. C. 352.)—*Barnett v. Glossop*, 3 D. P. C. 625.
3. (*Notice of trial.*) A notice of trial before the sheriff for Easter Tuesday is good. (Reg. Gen. H. T. 2 W. 4.)—*Charnock v. Smith*, 3 D.P.C. 607.



## EQUITY.

[1 *Younge & Collyer*, Part 1 ; 6 *Simons*, Part 1 ; and such cases in 2 *Clarke & Finnelly*, Part 2 ; and 7 *Bligh*, Part 1, as are not included in former Digests.]

### ANNUITY.

A testator gave an annuity, payable half-yearly, to his son for his maintenance and education until he attained twenty-one, and another annuity, payable in like manner to his daughter, (who was an adult,) during the son's minority. Held, that as the son was entitled to a proportional part of his annuity for the time between the last half-yearly day of payment, and his attaining twenty-one, the daughter was also entitled to a proportional payment of her annuity for the same space of time.—*Weigall v. Brome*, Sim. 99.

### ATTORNEY AND CLIENT.

A testator having made his will devising a freehold estate, afterwards sold a part of the estate ; a fine being necessary for the purpose of clearing the title, his attorney advised the levying a fine of the whole of the estate, without stating what the effect would be. The fine was levied, and the vendor died, without declaring its uses, or republishing his will. After his death the attorney claimed the estate as his heir-at-law, on the ground that the will was revoked by the fine. On a bill by the devisee, the Court of Chancery directed an issue, when the jury found that the attorney fraudulently omitted to tell the testator what effect the fine would have. The Court of Chancery, upon that verdict, decreed the attorney to be a trustee for the devisee. The House of Lords, affirming that decree, further held, that the attorney's alleged ignorance of the effect of the fine, and his omission to inquire whether the testator, his client, had made a will, were such professional ignorance and neglect as warranted a Court of Equity, independently of the fraud, in holding him to be a trustee.—(*Seagrave v. Kirwan*, 1 Beatty, 157.)—*Bulkley v. Wilford*, C. & F. 102.

### BANKRUPT.

In general an uncertificated bankrupt cannot file a bill against his assignees for an account of their dealings under the bankruptcy ; nor can the bankrupt obtain this relief indirectly, by charging fraud and collusion between the assignees and a third party, where the bill states no specific acts of fraud on the part of the assignees, and prays no relief against them on the ground of fraud. (*Saxton v. Davis*, 18 Ves. 72, 1 Rose, 70.)—*Tarleton v. Hornby*, Y. & C. 172.

### COSTS.

1. (*Copies of answers.*) Where any of the plaintiffs in a suit live in the

- country, close copies of the answer will be allowed, and the costs of them will be costs in the cause.—*Small v. Attwood*, Y. & C. 53.
2. (*Commissioners*.) Commissioners for the examination of witnesses ought not to be paid according to the number of office folios of the depositions, but according to the number of days on which they actually sit.—S. C.
3. (*Documents*.) The costs of all copies of documents, which are required by the judge for his assistance in hearing the cause, are costs in the cause.—S. C.
4. (*Accountant*.) The expense of an accountant, employed with reference to and pending the suit, does not come under the general denomination of costs, and will not be allowed on taxation, unless specially made part of the decree.—S. C.

#### DEBTOR AND CREDITOR.

- A. having received monies belonging to B., executed, without any communication with B., a mortgage to him for the amount. A. retained the deed in his possession until his death, when it was discovered in a chest containing his title-deeds. Held, that the mere retainer of the deed was immaterial, and that in the absence of evidence of fraud, or inability in A. to grant, the security was good against A.'s creditors.—*Exton v. Scott*, Sim. 31.

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- The mere refusal of a witness to produce a document, where he is not justified in withholding it, is not a ground for going into secondary evidence of its contents.—*Jesus College v. Gibbs*, Y. & C. 145.

#### EXCHANGE.

- The donees of a power of sale and exchange may pay money for owelty of exchange, although they are not expressly authorized so to do.—*Bartram v. Whichcote*, Sim. 86.

#### HUSBAND AND WIFE.

1. (*Rights of Wife*.) A husband and his wife having agreed to live apart from each other, a sum of stock was invested in the name of trustees, and, by a separation deed, the husband covenanted to pay to his wife, for her support and maintenance, an annuity of 180*l.* a-year, and it was declared that the stock was intended as a security for the payment of that annuity. The deed contained a proviso that the husband should be indemnified out of the annuity against the debts of his wife, and all dower and thirds at common law, or by custom, which she at any time thereafter might claim, challenge, or demand from, out of, upon, or against her husband, or his present or future estate, real or personal; and also an agreement by the wife to make and execute all such assurances, matters, and things, as should be requisite for the purpose of releasing, barring, or extinguishing all dower or thirds at the common law, or by custom, which she could or might claim or demand in, to, or out of any real or personal estate of or belonging to, or to belong to, her husband. The husband afterwards died intestate and without issue:

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Held, that the deed contained nothing to deprive the wife of her distributive share of her husband's personal estate.—*Slatter v. Slatter*, Y. & C. 28.

2. (*Reduction of wife's chose in action.*) Where the first husband of a woman entitled to a legacy of 600*l.*, chargeable, in default of personality, on the testator's real estate, verbally agreed with the three devisees of the real estate to sell the legacy to them for 200*l.* a-piece, but received the consideration from one only of the devisees, taking interest on the 400*l.* due from the two others: Held, that as to the 400*l.* there was no reduction into possession by the first husband, and that his representatives were not necessary parties to a bill by the woman and her second husband for the recovery of the 400*l.*—*Harwood v. Fisher*, Y. & C. 110.
3. (*Restraint on alienation.*) By a marriage settlement, money and stock were assigned to trustees, in trust, to receive the income during the life of the lady, and pay the same to her for her separate use, or as she should appoint, notwithstanding her coverture, but no payment to be made by anticipation; and it was declared that the income should not be subject to the debts, &c. of R. G. her intended husband; and, after her decease, in case he should survive, in trust to permit him to receive the income for his life, &c. The husband died in the life-time of his wife, and she married again: Held, that the restraint on anticipation was confined to the first marriage. (*Massey v. Parker*, 2 M. & K. 182.)—*Knight v. Knight*, Sim. 121.
4. (*Same.*) A testator directed the interest of a sum of money to be for the separate use of his daughter, the wife of J. Lane, for her life, free from the debts of her husband. The husband died, and his widow married again: Held, that the trust for the wife's separate use ceased on the death of the husband. (*Massey v. Parker*, 2 M. & K. 182.)—*Benson v. Benson*, Sim. 126.
5. (*Marriage articles.*) By marriage articles, it was agreed that estates should be settled in strict settlement, and that there should be contained in the settlement, powers to the husband to charge the estate, by way of mortgage, with a certain sum, and also to charge the estates with another sum for younger children, and to create terms for raising those sums, and likewise all other powers usually inserted in settlements of the like nature, and which should be proper for effecting any of the purposes aforesaid: Held, that powers of sale and exchange would be properly introduced.—*Hill v. Hill*, Sim. 136.

#### INJUNCTION.

A receiver having been appointed, in a creditor's suit, to the office of Master Forester of a royal forest, an injunction was afterwards granted to restrain certain persons who owned lands in the forest from sporting in it.—*Blanchard v. Cawthorne*, Sim. 155.

#### INTERPLEADER.

Where a principal has created a lien in favour of a third person on funds

in the hands of his agent, the latter may file a bill of interpleader. (See *Mason v. Hamilton*, 5 Sim. 19.)—*Smith v. Hammond*, Sim. 10.

### LEASE.

1. (*Renewed.*) Where an agreement to renew a lease contains no stipulation as to the term of its duration, it is implied that the new lease shall be of the same duration as the old.—*Price v. Assheton*, Y. & C. 82.
2. (*Power.*) One having a power to lease at the most improved rent, agrees to grant a lease at a rent to be estimated at a fair valuation, without reference to improvements made by the lessee, but these improvements are deemed part of the consideration for the lease. *Quere*, whether such a lease is consistent with the terms of the power?—S. C.

### LEGACY DUTY.

A testator resident in India died, leaving real and personal property there but no assets in England. His executors, who were in India before and at the time of his death, having obtained an Indian probate, paid his debts and bequests, and got in his estate, and converted the principal part thereof into money, which they sent to their bankers in England, and afterwards invested in the funds in their own names. A suit was afterwards instituted in the Court of Chancery in England, to ascertain the claims of the residuary legatees under the will; whereupon the stock was transferred into the name of the Accountant-General. On a claim on behalf of the Crown for the legacy duty on the residuary fund: Held, that no legacy duty was payable. (*Logan v. Fairlie*, 2 S. & St. 291.)—*Attorney-General v. Forbes*, C. & F. 48.

### LONDON BRIDGE ACT.

1. A tenant for life of lands sold under the provisions of the London Bridge Act, (10 Geo. 4, c. 136,) is not entitled to his costs out of the fund arising from the sale.—*Exp. Pasmore*, Y. & C. 75.
2. Trustees for sale of lands in settlement, which lands are afterwards sold under the provisions of the London Bridge Act, 10 G. 4, c. 136, are entitled to their costs out of the corpus of the fund arising from the sale.—*Exp. Layfield*, Y. & C. 79.

### LONDON AND BIRMINGHAM RAIL-WAY COMPANY.

1. Where an act of parliament establishing a rail-way company, authorized the company to purchase lands of corporations, tenants for life, &c. and directed that the purchase-money should be applied in the redemption of the land-tax upon other parts of the property unsold: Held, that a tenant for life who had redeemed the land-tax before the act might reimburse himself out of the proceeds of the land purchased by the company.—*Exp. Northwich*, Y. & C. 166.
2. The costs of an application to the Court under such an act of parliament to have the purchase-money applied in the redemption of the land-tax, will be allowed out of the purchase-money, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses.—S. C.

- a. 11, for an infant heir or devisee to convey, must be made by petition, and not by motion.—*Anon.* Y. & C. 75.
3. (*Books in Court.*) Where books, papers and writings, mentioned in a schedule to the defendant's answer, are deposited by the defendant with his clerk in court for the inspection and examination of the plaintiff, under the usual order for that purpose, the defendant is entitled to have them restored to him so soon as such inspection and examination have taken place; and the plaintiff is not entitled to have them retained in the custody of the clerk in court, notwithstanding that it may be necessary that they should be produced before the Master in taking the accounts directed by the decree, or on the hearing of an appeal from the decree. The Master may call for them when he pleases.—*Small v. Attwood*, Y. & C. 37.
  4. (*Production of documents.*) A deed in the custody of a defendant, a purchaser for valuable consideration, but which the bill impeached for fraud, was ordered to be produced under special circumstances.—*Kennedy v. Green*, Sim. 6.
  5. (*Same.*) A voluntary deed in favour of the defendant sought to be impeached, and which was in the custody of the defendant's solicitor, who claimed a lien on it, was ordered to be produced, after it had been proved by the defendant, and publication had passed. (*Balch v. Symes*, 1 T. & R. 87.)—*Fencott v. Clarke*, Sim. 8.
  6. (*Same.*) A charge in the bill that papers and documents are in the possession or power of the defendant or his solicitor, is not answered by a denial that they are in the possession or power of the defendant.—*Bond v. Northover*, Y. & C. 221.
  7. (*Same.*) Where a defendant appears to be a bare trustee for the plaintiff, and offers no explanation to the contrary, the Court will compel the production of deeds and documents admitted, by his answer, to be in his possession.—*Sparke v. Moretown*, Y. & C. 103.
  8. (*Same.*) The mere circumstance of a defendant incorporating a deed in his answer, whether by reference to the schedule or otherwise, is not a ground for compelling its production, if in other respects such production would be inequitable.—*S. C.*
  9. (*Same.*) The Court will not, upon motion before the hearing, compel an incumbrancer to produce at the hearing deeds which are admitted by his answer, but which are his title-deeds, even though the plaintiff may have an interest in such deeds; but, under circumstances, the Court will direct them to be proved before the examiner without prejudice.—*S. C.*
  10. (*Service.*) The respondents to a charity petition, are parties to the petition, and not within the 44th order of 1828, relative to service on the solicitor of a person, not a party, appearing in any proceeding.—*In re Wilmoughby's Charity*, Sim. 18.
  11. (*Exceptions.*) On the hearing of exceptions to the Master's report, such parts only of the answer can be read as were read before the Master.—*Rands v. Preshman*, Sim. 46.

12. (*Same.*) Where exceptions are taken to separate answers which are substantially the same, one previous order is sufficient.

*Semble*, that defendant obtaining the previous order, need not also take out an order *nisi* for dissolving the injunction.—*Taylor v. Sheppard*, Y. & C. 99.

13. (*Same.*) Where exceptions are taken to the Master's certificate, with a general allegation that the Master is wrong in all "the particulars" complained of; then, if the Master is right in one point, all the exceptions must be overruled; but the exceptant will be allowed to amend, on payment of costs. (*Green v. Weaver*, 1 Sim. 404.)—*Gompertz v. Best*, Y. & C. 114.

14. (*Impertinence.*) Prolivity in an answer is impertinence, but it is a question of degree. Therefore, in a bill for an account of money transactions between the plaintiff and the defendant, it having been required that the defendant should set forth in a schedule a variety of minute particulars concerning certain securities which were alleged to have been deposited with him: Held, that setting forth the information required in a schedule with columns was not impertinent. (*Bally v. Williams*, 1 McClell. & Y. 334.)—*Gompertz v. Best*, Y. & C. 114.

15. (*Order to confirm purchase.*)—The order for confirming absolutely a Master's report as to a purchase, when served, operates from the day on which it was pronounced.—*Aberdeen v. Watkin*, Sim. 146.

16. (*Seventeenth Order.*) The 17th Order of 1831 does not apply except, in cases where the plaintiff requires a commission; in other cases, the old practice remains unaltered.—*Williams v. Jannaway*, Sim. 77.

### PROBATE DUTY.

Where a testator dies in this country possessed of personal property here and also in foreign funds, and the executor takes out probate here and pays probate duty on the amount of the property in this country, he is not chargeable with the duty in respect of the property in the foreign funds, although he afterwards obtain such property and administer it.—*Att. Gen. v. Hope*, C. & F. 84.

### SCOTCH SETTLEMENT.

By a Scotch settlement a sum of stock was settled on the husband and wife for their lives, and after the death of the survivor, on their children, and failing children, on the nearest heirs of the wife; and she was empowered, at any time in her life, and even on her death bed, to bequeath or dispose of the stock to any person and in any manner she might think proper: Held, that the power was available only in case there were no children of the marriage.—*Peddie v. Peddie*, Sim. 78.

### SPECIFIC PERFORMANCE.

1. In a correspondence between lessor and lessee respecting the granting of a new lease to the lessee, the latter having spoken of the renewal of the old lease, the lessor did not object to this expression, but adverted to other topics connected with the subject. On a bill filed for the specific performance of the agreement for renewal alleged to be contained in these



letters: Held, that there was sufficient evidence to warrant the continuance of an injunction.—*Price v. Assheton*, Y. & C. 82.

2. After a decree for a specific performance against the infant heir of a vendor, a petition that the infant may convey is necessary under 1 Will. 4, c. 60. (*Fellowes v. Till*, 5 Sim. 319.)—*Prytharck v. Havard*, Sim. 9.

#### TENANT IN TAIL.

(*Recovery—Resulting use.*) A recovery by tenant in tail, without a declaration of use, enlarges the estate into a fee; and if uses are declared which cannot take effect, the tenant in tail takes an estate in fee.—*Tanner v. Radford*, Sim. 21.

#### TITHES.

1. (*Chapeltry.*) Where it appeared from ancient documents that a chapel had immemorially existed as a parochial chapel, with rites of baptism, marriage, and sepulture, as far back as the 10 Eliz.; and that chaplains were mentioned as celebrating divine service there, and as having had an assignment of tithes "of old time;" and there were appointments to the curacy from a very early period; and there was evidence of usage, on the part of the curate, to receive all small tithes of modern introduction: Held, that the curate was entitled to all small tithes except wool and lamb, which appeared to be payable to the rector.—*Dent v. Rob.* Y. & C. 1.
2. (*Same.*) Where parishioners, dwelling within a chapelry, contribute to the repairs of the parish church, it is strong, but not conclusive, evidence that the chapel is a chapel of ease to the inhabitants of the parish, and not a separate and distinct chapelry.—*S. C.*
3. (*Same.*) It does not of necessity follow that there cannot be a parochial chapel because there has not been an union of parishes in ancient times nor any vicarage or mother church with which the chapel can be supposed to have been anciently united.—*S. C.*
4. (*Composition real.*) Though it is not necessary to produce the deed of composition in order to support a defence of a composition real, still reasonable evidence must be given to make it probable that there was such a deed. The mere circumstance of the possession by the curate of a piece of land mentioned in various ancient documents as having been assigned to the curate, is not a sufficient ground for such probability.—*S. C.*
5. (*Modus.*) Issue directed to try the validity of a modus laid for a very small district, though the map attached to the answer varied from that given in evidence by the defendants, and though the defendants relied on evidence of reputation to prove the bounds of the district.—*Barnes v. Stuart*, Y. & C. 119.
6. (*Smaller monasteries.*) The lands of smaller monasteries, which were surrendered to the king after the 27 Hen. 8, c. 28, and were at the time of their surrender free from tithes, are within the protection of 31 Hen. 8, c. 13, s. 21.—*S. C.*
7. (*Evidence of discharge.*) To show that a monastery held lands discharged from tithes by prescription at the time of its dissolution, positive evidence must be given that the monastery existed prior to the time of

legal memory; but if this evidence be given, its possession of the lands before that period may be left to presumption.—*S. C.*

8. (*Pleading.*) Under the general pleading that the lands were at the time of the dissolution held discharged "by prescription, or other lawful ways and means," the defendants may give evidence of any legal discharge.—*S. C.*
9. (*Attachment.*) Where the time for answering has expired, and an attachment is duly taken out, the defendant cannot demur, (*Mellor v. Hall*, 2 S. & St. 321); and where the demurrer is filed on the same day on which the attachment issues, the latter has the priority, without regard to hours. (*Whitehouse v. Hickman*, 1 S. & St. 102.)—*Taylor v. Sheppard*, Y. & C. 94.
10. (*Issue.*) A double issue may be directed to try the validity of a farm modus, the inquiry being, 1st, As to the existence of the ancient farm; 2d, As to the payment of the modus.—*Bryan v. Parker*, Y. & C. 170.
11. (*Modus.*) Where a modus is laid with exceptions, it may be proved by some witnesses who speak to a general modus, and others who speak to the exceptions.—*Hadow v. Barnett*, Y. & C. 164.

And see PLEADING, 8.

#### WEST INDIES RELIEF ACT.

1. Under the stat. 2 & 3 W. 4, c. 125, for granting relief to the West Indies, the commissioners have no power to advance monies, except upon such securities as shall have priority over all other securities.—*Borrodaile v. Brickwood*, Y. & C. 60.
2. A mortgagor out of possession is not "an owner or person interested" in the property, within the terms of the act, so as to authorize the commissioners, without consent of the mortgagees, to advance monies to him in respect of damage done by hurricanes to the mortgaged premises.—*S. C.*

#### WILL.

1. (*Construction.*) A testator directed his real estates to be settled on certain persons in strict settlement, and that there should be inserted in the settlement so to be made, powers of leasing, sale, partition, and exchange. "And my will is, that in such intended settlement shall be inserted all such other proper and reasonable powers as are usually inserted in settlements of the like nature." Held, that a power to appoint new trustees was proper and reasonable.—*Lindon v. Fleetwood*, Sim. 152.
2. (*Same.*) A testator, after giving specific and pecuniary legacies, directed that A. and B. should divide, equally, any monies which might remain to his account after payment of his debts and pecuniary legacies. The testator at the date of his will, and at his death, had money accounts subsisting between him and his bankers, and other persons: Held, that the general residue did not pass, but only the balance due on the accounts after payment of the debts and legacies.—*Hastings v. Hane*, Sim. 67.

## EQUITY.

[1 *Younge & Collyer*, Part 1 ; 6 *Simons*, Part 1 ; and such cases in 2 *Clarke & Fianelly*, Part 2 ; and 7 *Bligh*, Part 1, as are not included in former Digests.]

### ANNUITY.

A testator gave an annuity, payable half-yearly, to his son for his maintenance and education until he attained twenty-one, and another annuity, payable in like manner to his daughter, (who was an adult,) during the son's minority. Held, that as the son was entitled to a proportional part of his annuity for the time between the last half-yearly day of payment, and his attaining twenty-one, the daughter was also entitled to a proportional payment of her annuity for the same space of time.—*Weigall v. Brome*, Sim. 99.

### ATTORNEY AND CLIENT.

A testator having made his will devising a freehold estate, afterwards sold a part of the estate ; a fine being necessary for the purpose of clearing the title, his attorney advised the levying a fine of the whole of the estate, without stating what the effect would be. The fine was levied, and the vendor died, without declaring its uses, or republishing his will. After his death the attorney claimed the estate as his heir-at-law, on the ground that the will was revoked by the fine. On a bill by the devisee, the Court of Chancery directed an issue, when the jury found that the attorney fraudulently omitted to tell the testator what effect the fine would have. The Court of Chancery, upon that verdict, decreed the attorney to be a trustee for the devisee. The House of Lords, affirming that decree, further held, that the attorney's alleged ignorance of the effect of the fine, and his omission to inquire whether the testator, his client, had made a will, were such professional ignorance and neglect as warranted a Court of Equity, independently of the fraud, in holding him to be a trustee.—(*Seagrave v. Kirwan*, 1 Beatty, 157.)—*Bulkley v. Wilford*, C. & F. 102.

### BANKRUPT.

In general an uncertificated bankrupt cannot file a bill against his assignees for an account of their dealings under the bankruptcy ; nor can the bankrupt obtain this relief indirectly, by charging fraud and collusion between the assignees and a third party, where the bill states no specific acts of fraud on the part of the assignees, and prays no relief against them on the ground of fraud. (*Saxton v. Davis*, 18 Ves. 72, 1 Rose, 70.)—*Tarleton v. Hornby*, Y. & C. 172.

### COSTS.

1. (*Copies of answers.*) Where any of the plaintiffs in a suit live in the

country, close copies of the answer will be allowed, and the costs of them will be costs in the cause.—*Small v. Attwood*, Y. & C. 53.

2. (*Commissioners*.) Commissioners for the examination of witnesses ought not to be paid according to the number of office folios of the depositions, but according to the number of days on which they actually sit.—S. C.
3. (*Documents*.) The costs of all copies of documents, which are required by the judge for his assistance in hearing the cause, are costs in the cause.—S. C.
4. (*Accountant*.) The expense of an accountant, employed with reference to and pending the suit, does not come under the general denomination of costs, and will not be allowed on taxation, unless specially made part of the decree.—S. C.

#### DEBTOR AND CREDITOR.

- A. having received monies belonging to B., executed, without any communication with B., a mortgage to him for the amount. A. retained the deed in his possession until his death, when it was discovered in a chest containing his title-deeds. Held, that the mere retainer of the deed was immaterial, and that in the absence of evidence of fraud, or inability in A. to grant, the security was good against A.'s creditors.—*Exton v. Scott*, Sim. 31.

#### EVIDENCE.

The mere refusal of a witness to produce a document, where he is not justified in withholding it, is not a ground for going into secondary evidence of its contents.—*Jesus College v. Gibbs*, Y. & C. 145.

#### EXCHANGE.

The donees of a power of sale and exchange may pay money for owelty of exchange, although they are not expressly authorized so to do.—*Bartram v. Whichcote*, Sim. 86.

#### HUSBAND AND WIFE.

1. (*Rights of Wife*.) A husband and his wife having agreed to live apart from each other, a sum of stock was invested in the name of trustees, and, by a separation deed, the husband covenanted to pay to his wife, for her support and maintenance, an annuity of 180*l.* a-year, and it was declared that the stock was intended as a security for the payment of that annuity. The deed contained a proviso that the husband should be indemnified out of the annuity against the debts of his wife, and all dower and thirds at common law, or by custom, which she at any time thereafter might claim, challenge, or demand from, out of, upon, or against her husband, or his present or future estate, real or personal; and also an agreement by the wife to make and execute all such assurances, matters, and things, as should be requisite for the purpose of releasing, barring, or extinguishing all dower or thirds at the common law, or by custom, which she could or might claim or demand in, to, or out of any real or personal estate of or belonging to, or to belong to, her husband. The husband afterwards died intestate and without issue:

Held, that the deed contained nothing to deprive the wife of her distributive share of her husband's personal estate.—*Slatter v. Slatter*, Y. & C. 28.

2. (*Reduction of wife's chose in action.*) Where the first husband of a woman entitled to a legacy of 600*l.*, chargeable, in default of personalty, on the testator's real estate, verbally agreed with the three devisees of the real estate to sell the legacy to them for 200*l.* a-piece, but received the consideration from one only of the devisees, taking interest on the 400*l.* due from the two others: Held, that as to the 400*l.* there was no reduction into possession by the first husband, and that his representatives were not necessary parties to a bill by the woman and her second husband for the recovery of the 400*l.*—*Harwood v. Fisher*, Y. & C. 110.
3. (*Restraint on alienation.*) By a marriage settlement, money and stock were assigned to trustees, in trust, to receive the income during the life of the lady, and pay the same to her for her separate use, or as she should appoint, notwithstanding her coverture, but no payment to be made by anticipation; and it was declared that the income should not be subject to the debts, &c. of R. G. her intended husband; and, after her decease, in case he should survive, in trust to permit him to receive the income for his life, &c. The husband died in the life-time of his wife, and she married again: Held, that the restraint on anticipation was confined to the first marriage. (*Massey v. Parker*, 2 M. & K. 182.)—*Knight v. Knight*, Sim. 121.
4. (*Same.*) A testator directed the interest of a sum of money to be for the separate use of his daughter, the wife of J. Lane, for her life, free from the debts of her husband. The husband died, and his widow married again: Held, that the trust for the wife's separate use ceased on the death of the husband. (*Massey v. Parker*, 2 M. & K. 182.)—*Benson v. Benson*, Sim. 126.
5. (*Marriage articles.*) By marriage articles, it was agreed that estates should be settled in strict settlement, and that there should be contained in the settlement, powers to the husband to charge the estate, by way of mortgage, with a certain sum, and also to charge the estates with another sum for younger children, and to create terms for raising those sums, and likewise all other powers usually inserted in settlements of the like nature, and which should be proper for effecting any of the purposes aforesaid: Held, that powers of sale and exchange would be properly introduced.—*Hill v. Hill*, Sim. 136.

#### INJUNCTION.

A receiver having been appointed, in a creditor's suit, to the office of Master Forester of a royal forest, an injunction was afterwards granted to restrain certain persons who owned lands in the forest from sporting in it.—*Blanchard v. Cawthorne*, Sim. 155.

#### INTERPLEADER.

Where a principal has created a lien in favour of a third person on funds

in the hands of his agent, the latter may file a bill of interpleader. (See *Mason v. Hamilton*, 5 Sim. 19.)—*Smith v. Hammond*, Sim. 10.

## LEASE.

1. (*Renewed.*) Where an agreement to renew a lease contains no stipulation as to the term of its duration, it is implied that the new lease shall be of the same duration as the old.—*Price v. Asheton*, Y. & C. 82.
2. (*Power.*) One having a power to lease at the most improved rent, agrees to grant a lease at a rent to be estimated at a fair valuation, without reference to improvements made by the lessee, but these improvements are deemed part of the consideration for the lease. *Quere*, whether such a lease is consistent with the terms of the power?—S. C.

## LEGACY DUTY.

A testator resident in India died, leaving real and personal property there but no assets in England. His executors, who were in India before and at the time of his death, having obtained an Indian probate, paid his debts and bequests, and got in his estate, and converted the principal part thereof into money, which they sent to their bankers in England, and afterwards invested in the funds in their own names. A suit was afterwards instituted in the Court of Chancery in England, to ascertain the claims of the residuary legatees under the will; whereupon the stock was transferred into the name of the Accountant-General. On a claim on behalf of the Crown for the legacy duty on the residuary fund: Held, that no legacy duty was payable. (*Logan v. Fairlie*, 2 S. & St. 291.)—*Attorney-General v. Forbes*, C. & F. 48.

## LONDON BRIDGE ACT.

1. A tenant for life of lands sold under the provisions of the London Bridge Act, (10 Geo. 4, c. 136,) is not entitled to his costs out of the fund arising from the sale.—*Exp. Pasmore*, Y. & C. 75.
2. Trustees for sale of lands in settlement, which lands are afterwards sold under the provisions of the London Bridge Act, 10 G. 4, c. 136, are entitled to their costs out of the corpus of the fund arising from the sale.—*Exp. Layfield*, Y. & C. 79.

## LONDON AND BIRMINGHAM RAIL-WAY COMPANY.

1. Where an act of parliament establishing a rail-way company, authorized the company to purchase lands of corporations, tenants for life, &c. and directed that the purchase-money should be applied in the redemption of the land-tax upon other parts of the property unsold: Held, that a tenant for life who had redeemed the land-tax before the act might reimburse himself out of the proceeds of the land purchased by the company.—*Exp. Northwich*, Y. & C. 166.
2. The costs of an application to the Court under such an act of parliament to have the purchase-money applied in the redemption of the land-tax, will be allowed out of the purchase-money, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses.—S. C.

## AWARD.

A bankrupt having conveyed real estate to trustees, (his creditors,) upon certain trusts for the payment of his debts, subsequently entered into an agreement with them as to the sale, after which he took forcible possession of part of it, and the trustees brought an action of ejectment, which, with another action, was referred to the decision of an arbitrator. The award found, that the creditors were entitled to recover in the action of ejectment, and directed that a sum of money which was due to the trustees, for expenses incurred by them in the execution of the trusts, should be paid by instalments, and in default of payment that the property should be sold and the proceeds applied in discharge of the debt: Held, that the award, though it was no charge upon the land, did not destroy the lien thereon, given to the trustees for expenses in the execution of the trusts.—*Exp. Coppard*, D. & C. 102.

## BANKRUPT.

1. (*Act of Bankruptcy*.) A country trader having been arrested on a bill, and having put in bail, promised to attend next day and pay the same; he, however, went to London to procure funds, and wrote to the creditors, that that would prevent his keeping the appointment: Held, that this was not an act of bankruptcy by absence.—*Exp. Lavender*, M. & A. 11.
2. (*Committal*.) To justify the committal of a bankrupt for not answering satisfactorily, the commissioners should point out the unsatisfactory answers, and press those points.—*Exp. Dee*, M. & A. 15.
3. (*Petition to supersede*.) Where the bankrupt knows he has committed an act of bankruptcy, his petition to supersede will be dismissed with costs.—*Exp. Thompson*, M. & A. 41.
4. (*Uncertificated*.) An uncertificated bankrupt cannot petition that his assignees may be ordered to account, without alleging that his estate will produce a surplus after paying 20s. in the pound.—*Exp. Ryley*, D. & C. 50.

## BILL OF EXCHANGE.

1. H. and Co. drew bills on P. and Co., who accepted them for valuable consideration. H. and Co. indorsed them to Heaviside without consideration, and Heaviside discounted them with W. and Co. The parties became bankrupt. The assignees of H. and Co. are not entitled to have the bills delivered up by W. and Co. on paying their amount.—*Exp. Dickson*, M. & A. 99.
2. (*Proof*.) An affidavit in support of a deposition of proof on a bill, must state the consideration. But if a defective affidavit be produced, the commissioner should not reject, but adjourn the proof for further evidence.—*Exp. Maberly*, M. & A. 23.
3. (*Proof*.) B. and Co. accepted an accommodation bill for G. and Co., who indorsed it to V. and Co., and deposited it with them as a security for advances: Held, that V. and Co. might prove the amount against B. and Co.—*Exp. Vere*, M. & A. 123.

## CERTIFICATE.

1. On a petition to stay the certificate, by a creditor at whose suit the bankrupt is in custody, the bankrupt must be discharged before the petition can be heard.—*Exp. Green*, D. & C. 112.
2. A creditor who becomes bankrupt after proving his debt, may nevertheless petition to stay the first bankrupt's certificate, if the assignees of the creditor do not interfere.—*Exp. Taylor*, D. & C. 125.
3. The certificate cannot be stayed for misconduct before the fiat issued. (*Exp. Gardner*, 1 Rose, 379.)—*Exp. Gordon*, M. & A. 30.

## COSTS.

1. (*Assignees*.) A proof having been expunged by the commissioners on the application of the assignees, was restored by the Court: Held, that the costs should come out of the estate. (*Exp. Reay*, 3 D. & C. 175.)—*Exp. Brookes*, M. & A. 78.
2. (*Same*.) On a petition by an assignee for his removal, admitting misconduct, he cannot be ordered to pay costs incurred by such misconduct without a cross-petition.—*Exp. Angle*, M. & A. 38.
3. (*Affidavit*.) An order made on the hearing of a petition, that a party shall pay the costs, includes the costs of an affidavit filed by the other party, although it was not read on the hearing of the petition.—*Exp. Sidebottom*, D. & C. 141.
4. (*Same*.) Though an affidavit, alleged to be impertinent, is not read, it will be included in the order for costs by the registrar, unless ordered to be excluded at the hearing, all affidavits filed being considered as read on the subject of costs. (*Exp. Lucas*, 1 M. & A. 405.)—*Exp. Barrington*, M. & A. 72.
5. (*Commissioners*.) Where the commissioners expunged a proof, on the application of the assignees, and the creditor afterwards succeeded on a petition to have it restored, the Court gave him the costs of the petition, as well as of the proceedings before the commissioners.—*Exp. Brookes*, D. & C. 209.
6. (*Fraud*.) In cases of fraud, costs may be granted, though not prayed. (*Exp. Webster*, V. C. 3d Aug. 1826.)—*Exp. Taylor*, M. & A. 38.

And see ASSIGNEE, 1; EQUITABLE MORTGAGE; PRACTICE, 9, 10, 11.

## EQUITABLE MORTGAGEE.

1. (*Leave to bid*.) On the usual petition of an equitable mortgagee for a sale, and leave to bid, the costs come out of the estate, though the assignees do not consent. *Secus*, on an independent petition.—*Exp. Berkeley*, M. & A. 54.
2. (*Costs*.) Letters sent subsequent to the deposit are sufficient to entitle the equitable mortgagee to costs on a petition for sale; the principle being that there must be sufficient written evidence for the assignees to go by. *Exp. Reynolds*, M. & A. 104.
3. (*Same*.) An equitable mortgagee, coming for a sale and leave to bid, is



not entitled to the costs of defending an extent in aid, or to be excused from paying a deposit. *Exp. Stevens, M. & A. 31.*

4. (*Rent.*) On the sale of equitable mortgage, the right to the rents accrues from the date of the order of sale.—*Exp. Bignold, M. & A. 16.*
5. (*Interest.*) Where there has been an order made for the sale of mortgaged property, and the sale is afterwards deferred, the mortgagee is entitled to apply the rents and profits in reduction of the interest accruing subsequent to the order of sale, and up to the time of taking the account.—(Ex parte Martin, 2 Rosc. 87.)—*Exp. Ramsbottom, D. & C. 198.*
6. (*Policy of Assurance.*) On a deposit of a policy of assurance by way of equitable mortgage, the onus does not lie on the mortgagee to shew that notice of the deposit was given to the office before the act of bankruptcy; but with the assignees, to shew that it was not.—*Exp. Stevens, D. & C. 107.*
7. (*Notice.*) If a mortgagee be himself a trustee to whom notice must be given, the transaction itself is notice enough to prevent reputed ownership.—*Exp. Smart, M. & A. 60.*
8. (*Sale.*) The Court will only interfere to order the sale of equitable mortgages in cases where there is no dispute.—*Exp. Attwood, M. & A. 24.*

And see REPUTED OWNERSHIP, 5.

#### FIAT.

1. (*New.*) Except under special circumstances, the Court will never allow the petitioning creditor to issue a new fiat before the time for opening has elapsed. *Exp. Jacobs, M. & A. 102.*
2. (*Same.*) A fiat not having been filed, the Court, on an *ex parte* application of another creditor, refused to order it to be annulled; but allowed the creditor to issue a new fiat without prejudice to any right under the first.—*Exp. Gerathwohl, D. & C. 48.*
3. (*Annulling.*) A creditor whose debt is alleged to be usurious, cannot petition to annul the fiat for fraud, or stay the certificate. (*Exp. Hudson, 2 Russ. 456.*)—*Exp. Jerman, M. & A. 119.*
4. (*Superseding.*) Although there be no evidence of the trading on the proceedings, the fiat will not be superseded, if the bankrupt admitted to the petitioning creditor that he was a trader.—*Exp. Bailey, M. & A. 86.*
5. (*Deposit.*) On the less by the petitioning creditor of his evidence to support the fiat, the Court of Review will not, on a petition by another person for another fiat, order him to be exempt from paying the 10*l.* under section 45, and the 20*l.* under section 47 of 1 & 2 W. 4, c. 56.—*Exp. Osborn, M. & A. 140.*
6. (*Procedendo.*) After a fiat has been annulled by the Chancellor, the Court of Review may rehear and issue a *procedendo*.—*Exp. Lavender, M. & A. 103.*

## INJUNCTION.

A perpetual injunction was issued to restrain the bankrupt from proceeding at law to invalidate a commission issued ten years back, after actions and unsuccessful petitions, and acts of acquiescence. (Exp. Hill, Mont. 9.)  
—*Exp. White, M. & A. 104.*

## MORTGAGE.

A mortgage given on the eve of bankruptcy, for a very old debt, is so suspicious that the Court will not interfere on the petition of the mortgagee for a sale.—*Exp. Dewdney, M. & A. 72.*

## ORDER AND DISPOSITION.

The bankrupt having contracted for the delivery of a quantity of candles, and being unable to complete the contract, applies to the petitioner to assist him, by delivering a part of the quantity contracted for; which the petitioner agreed to do, provided the candles were delivered in his name. The bankrupt makes out a bill of parcels in the petitioner's name and sends his own waggons for the purpose of delivering the candles. The official assignee, after the bankruptcy, receives the price of the candles which had been furnished by the petitioner: Held, that he was bound to refund to the petitioner.—*Exp. Carlon, D. & C. 120.*

## PARTNERS.

Proof cannot be made by the joint against the separate estate, except in the case of a fraudulent abstraction from the joint funds by one of the partners; and not then, if there has been any waiver of the tortious act by the other partner, so as to reduce it to a matter of contract.—(Exp. Smith, 1 G. & J. 74.)—*Exp. Turner, D. & C. 169.*

## PETITION.

1. The general rule is, that a petition may be reheard on newly discovered facts.—*Exp. Lavender, M. & A. 117.*
2. A petition for supersedeas or to stay the certificate, cannot be reheard on new evidence.—S. C.

And see PRACTICE, 15.

## PRACTICE.

1. (*Affidavit.*) No application can be made in the matter of a petition, before an office copy is taken of the affidavit filed in support of it.—*Anonymous, D. & C. 141.*
2. (*Claim.*) Where property pledged by the bankrupt with a creditor is claimed by a third person, the creditor may enter a claim on the proceedings for the whole of his debt, till the legal right to the property is determined.—*Exp. Williams, D. & C. 180.*
3. (*Certificate.*) If there have been two commissions, and no dividend, it is in the discretion of the Court to allow or refuse the certificate.—*Exp. Green, M. & A. 31.*

4. (*Commission.*) The Court has no jurisdiction to order a commissioner to compel a witness to produce a document which the commissioner thinks he ought not to produce.—*Exp. Groom*, M. & A. 143.
5. (*Committal.*) The order of committal, after the four-day order, must be on petition.—*Exp. Myers*, M. & A. 87.
6. (*Same.*) An application to commit for non-production, &c. must be made on the same day the certificate is made.—*S. C.*
7. (*Consolidation.*) If the commissioners certify that a consolidation will be beneficial, the assignees need not be served.—*Exp. Smith*, M. & A. 60.
8. (*Copies of depositions.*) A petitioner to annul a fiat will not be allowed copies of the depositions before there is an office copy of the affidavit in support of the petition.—*Exp. Maltreu*, M. & A. 73.
9. (*Costs of committal.*) An order of committal for non-payment of costs, under which the party is committed, will not be suspended on the ground of an appeal, unless the costs are paid into Court.—*Exp. Fox*, M. & A. 18.
10. (*Costs—Attachment.*) An attachment for payment of costs is of course after disregard of the four-day order, but, unless *ex necessitate*, it will not be issued in vacation.—*Exp. Hunt*, M. & A. 18.
11. (*Costs.*) The Court will, if necessary, intimate to a Master in Chancery that he should allow the costs of preparing a special case as part of the costs of an appeal given by the Lord Chancellor.—*Exp. Richards*, M. & A. 59.
12. (*Custody of proceedings.*) Where the majority of the assignees wish the proceedings to be in the hands of a particular solicitor, the order is of course for their delivery accordingly, unless gross misconduct be charged, and a cross petition for removal, or an injunction.—*Exp. Halford*, M. & A. 52.
13. (*Lapse of time.*)—A petition, after a lapse of time, by the executors of the bankrupt, to charge the assignees for the default of old assignees, does not lie.—*Exp. Richards*, M. & A. 75.
14. (*Same.*) After seven years, the Court refused to order the dividends to be refunded.—*Exp. Soper*, M. & A. 55.
15. (*Petition standing over.*) A petition will not be allowed to stand over to reply to affidavits in answer when there is laches.—*Exp. Sidebottom*, M. & A. 79.
16. (*Registry of order.*) An order of the Lord Chancellor, made in a suit brought by the assignees, was, on their application, ordered to be registered in the Court of Bankruptcy.—*Exp. Williams*, D. & C. 116.
17. (*Service.*) The affidavit on a motion for substituted service, must state that the party wilfully keeps out of the way to avoid service, and is not to be found.—*Exp. Blandy*, M. & A. 24.
18. (*Substitution.*) If the petitioning creditor pay a bill which he accepted for the bankrupt's accommodation, after it has been proved by the holder,

he may use the name of the proving creditor as a substitution for his own insufficient debt.—*Exp. Rogers*, M. & A. 153.

19. (*Varying minutes.*) The Court will not vary the minutes of a former order, which has been pronounced more than three months, except on a petition for re-hearing.—*Exp. Watson*, D. & C. 106.
20. (*Same.*) Minutes of an order can only be varied where there is some mistake or misunderstanding on the part of the officer, the only remedy in other cases is by re-hearing.—*Exp. Soper*, M. & A. 58.
21. (*Vivâ voce examination.*) If both parties agree a vivâ voce examination may be had of course. But if affidavits have been filed on both sides, the Court will read them in the first instance.  
If a vivâ voce examination be desired by the petitioner, he should state facts on his petition to shew the necessity, and make a preliminary application. *Exp. Dugard*, M. & A. 26, 27.
22. (*Same.*) In general the Court will not grant a vivâ voce examination after hearing a petition on affidavit; but the party is not estopped by not applying before the hearing.—*Exp. Thompson*, M. & A. 40.

#### PROOF.

1. (*Composition.*) A composition creditor, who receives a bond as part of the composition, is, on failure in payment, entitled to retain the bond, and prove. *Exp. Reary*, M. & A. 33.
2. (*Pledge.*) Where goods in which the bankrupts were jointly interested with A. B., were pledged with the creditor to secure the payment of an acceptance of the bankrupts, and part of the proceeds were received by the creditor before he applied to prove:—Held, that he must deduct the amount received before he could prove on the bill. (*Exp. Waring*, 2 Rose, 182.) *Exp. Prescott*, D. & C. 23.
3. (*Partners.*) If after the dissolution of a firm of three partners by the retirement of one, a creditor draw on the three, and the two accept in the style of the three, the two are liable. *Exp. Liddiard*, M. & A. 87.

And see BILL OF EXCHANGE, 2, 3. PARTNER.

#### REPUTED OWNERSHIP.

1. (*Agency.*) Where goods are delivered to a bankrupt to sell in the name of another, his selling them in his own name does not place them in his reputed ownership. *Exp. Carlon*, M. & A. 39.
2. (*Lien.*) By the deed of settlement of a banking company, it was stipulated that the company should have a lien on the shares of such proprietors as were customers and indebted to the bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor.

The bankrupt, at the time of his bankruptcy, was the owner of thirty of these shares, and had in his possession the certificates of ownership thus indorsed, being then largely indebted to the bank for advances:—

Held, that the bank continue to have their lien on the shares. *Exp. Plant, D. & C. 160.*

3. (*Fixtures.*) The owner of a freehold gave a mortgage for a term of years, but remained in possession; while in possession he added fixtures: Held, that they were not in his reputed ownership.—*Exp. Belcher, M. & A. 160.*
4. (*Same.*) A bankrupt, the owner as well as occupier, of a freehold cotton mill, gave the petitioners an equitable mortgage on it, "together with the steam-engines, and also all and singular other the moveable and fixed machinery and steam-pipes then in, upon, about, and belonging to the said steam-mill and premises, or occupied or used therewith." The bankrupt continued in possession of the mills and fixtures up to the period of his bankruptcy: Held, that the machinery was not in the reputed ownership of the bankrupt.—*Exp. Watson, D. & C. 143.*
5. (*Reversion.*) A bankrupt deposits with the petitioner, by way of equitable mortgage, an assignment which had been made to the bankrupt of a reversionary interest under a will; no notice of the assignment was given to the executors either by the bankrupt or by the petitioners:—Held, that the subject of the assignment was not in the order and disposition of the bankrupt.—*Exp. Newton, D. & C. 138.*
6. (*Separate estate of wife.*) Furniture, settled to the separate use of a wife, the possession being consistent with the settlement, is not in the reputed ownership of the husband.—*Exp. Massey, M. & A. 173.*

#### SERVANTS WAGES.

To entitle a servant to an allowance of six months' wages in full, the hiring need not be for a year.—*Exp. Collyer, M. & A. 29.*

#### SOLICITOR.

1. (*Dividends.*) If the solicitor to a fiat have dividends in his hands received from the assignees under a pretended authority from the creditor, the Court has jurisdiction to order him to pay them over to the creditor.—*Exp. Storey, M. & A. 54.*
2. (*Jurisdiction.*) Independently of the provisions in the acts of parliament, the Court of Review has a general jurisdiction to refer the bill of any solicitor of that Court for taxation.—*Exp. Copeland, D. & C. 86.*
3. (*Liability.*) On an agreement for the dissolution of a partnership between two solicitors, who were the solicitors to the commission, the remaining partner agreed to pay the partnership debts.

The assignees knowing this agreement, continued to employ the remaining partner: Held, that they could not charge the retiring partner with sums received by the partnership.—*Exp. Gould, M. & A. 48.*

4. (*Bidding.*) The solicitor to the fiat cannot have leave to bid at a sale of the bankrupt's property, unless under peculiar circumstances.—*Exp. Town, M. & A. 29.*

**SPECIFIC PERFORMANCE.**

The Court has jurisdiction to enforce a purchase of premises sold under Lord Loughborough's general order. (Exp. Barrington, 1 M. & A. 655.)—*Exp. Barrington*, M. & A. 246.

**SUPERSEDEAS.**

On a petition for a supersedeas, with consent of creditors, where one of the creditors could not be found, an order was made for the supersedeas, the petitioner undertaking to pay into Court the amount of the debt of the outstanding creditor.—*Exp. Crowther*, D. & C. 131.

**WITNESS.**

If, on a *vivâ voce* examination, witnesses are ordered out of Court, the petitioner, being a witness, has a right to remain in Court.—*Exp. Dugall*, M. & A. 84.

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## ABSTRACT OF PUBLIC GENERAL STATUTES.

(5 WILLIAM IV.)

**CAP. 1.**—An Act to explain an Act of the First Year of his present Majesty, for the more effectual Administration of Justice in England and Wales, so far as relates to the execution of Criminals in the County of Chester. [20th March, 1835.]

**CAP. 2.**—An Act to amend an Act of the thirty-eighth year of King George the Third, for preventing the mischiefs arising from the printing and publishing Newspapers, and Papers of a like nature, by Persons not known, and for regulating the printing and publication of such Papers in other respects; and to discontinue certain actions commenced under the Provisions of the said Act. [20th March, 1835.]

S. 1. Persons against whom suits shall have been commenced before the passing of this Act, for penalties incurred under the 38 Geo. 3, c. 78, may apply to the Court, or to a Judge, for an order to stay proceedings upon payment of costs; the Court or Judge, on proof of notice of the application given to the plaintiff or his attorney, shall make such order; and then upon payment or tender of costs, such suit shall be discontinued.

S. 2. Where any suit commenced before March 4th, 1835, has been renewed or continued before the passing of this Act, the Court or a Judge may make an order for discontinuing the same on payment of costs.

S. 3. In cases where a suit has been commenced since the 4th of March, discontinuance may be ordered without payment of costs.

S. 4. Nothing herein contained to extend to any action or information in which any judgment or conviction shall have passed before the passing of this Act, nor to any action or information by the Attorney or Solicitor-General.

S. 5. All penalties incurred under the recited Act to go wholly to his Majesty; and may be sued for in any of his Majesty's Courts of Record at Westminster, or of Exchequer in Scotland, wherein no essoin, privilege, protection, wager of law, or more than one imparlance shall be allowed.

S. 6. No persons shall commence or prosecute any suits for fines incurred under the recited Act, except in the name of the Attorney or Solicitor-General in England, of the King's Advocate in Scotland, or of the Solicitor or other officer of Stamps.

S. 7. Act may be altered this session.

**CAP. 3.**—An Act to apply certain Sums to the Service of the year one thousand eight hundred and thirty-five. [20th March, 1835.]

**CAP. 4.**—An Act for raising the Sum of Fifteen Millions by Exchequer Bills, for the Service of the year one thousand eight hundred and thirty-five. [20th March, 1835.]

CAP. 5.—An Act for punishing Mutiny and Desertion, and for the better Payment of the Army, and their Quarters. [13th April, 1835.]

CAP. 6.—An Act to indemnify the Governor-General and other Persons in respect of certain acts done in the Administration of the Government of the British Territories in the East Indies subsequent to the twenty-second day of April, one thousand eight hundred and thirty four, and to make these acts valid. [13th April, 1835.]

CAP. 7.—An Act for the regulation of his Majesty's Royal Marine Forces while on Shore. [13th April, 1835.]

CAP. 8.—An Act for the more effectual abolition of Oaths and Affirmations taken and made in various Departments of the State, and to substitute Declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial Oaths and Affidavits. [12th June, 1835.]

S. 1. In cases where by any Act or Acts relating to the customs, excise, or other offices, any oath or affidavit may be required to be taken or made by any person, the Lords of the Treasury may substitute a declaration in lieu of such oath or affidavit.

S. 2. Such substitution of a declaration to be inserted in the London Gazette; and after twenty-one days from the date of the instrument of substitution; the provisions of this Act to apply.

S. 3. After such period of twenty-one days it shall not be lawful to administer or take an oath in lieu of which such declaration has been directed.

S. 4. If any person shall make a false declaration in matters relating to the customs, excise, stamps, and taxes, or post-office, an additional penalty of 100*l.* to be inflicted.

S. 5. The oath of allegiance still to be required in all cases as heretofore.

S. 6. Oaths in judicial proceedings in courts of justice, and in proceedings by way of summary conviction before justices, to be required as heretofore.

S. 7. Universities of Oxford and Cambridge, and other bodies corporate and politic, may substitute a declaration in lieu of an oath.

S. 8. Churchwardens and sidesmen, on entering into office, to make and subscribe a declaration in lieu of the oath hitherto required.

S. 9. In cases under turnpike trusts, a declaration to be made in lieu of an oath.

S. 10. Same provisions on taking out a patent.

S. 11. Where by any Acts for regulating the business of pawnbrokers, an oath or affidavit is required, a declaration to be made and subscribed in lieu thereof; and all enactments and penalties relating to such oaths to apply to declarations.

S. 12. Justices not to administer oaths or affidavits touching any matter whereof they have no jurisdiction by statute: provided that this shall not extend to any oath in any matter touching the preservation of the peace, or the prosecution, trial, or punishment of offences.

S. 13. Fees hitherto payable on oaths to be payable on declarations in lieu thereof.

S. 14. False declarations to be punishable as perjury; and in any indictment for such offence, it shall be sufficient to allege generally that the declaration therein charged to have been falsely made was a declaration duly substituted in lieu of an oath.

S. 15. This Act to take effect from June 15, 1835.

S. 16. May be altered this session.

CAP. 9.—An Act to apply a Sum of Eight Millions, out of the Consolidated Fund, to the Service of the year one thousand eight hundred and thirty-five. [17th June, 1835.]

CAP. 10.—An Act to allow, until the twenty-eighth day of July, one thousand eight hundred and thirty-five, the Importation of certain Articles, Duty-free, into the Island of Dominica, and to indemnify the Governor and others for having permitted the Importation of such Articles Duty-free. [3d July, 1835.]

CAP. 11.—An Act to indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and for extending the time limited for those purposes respectively until the twenty-fifth day of March, one thousand eight hundred and thirty-six; to permit such Persons in Great Britain as have omitted to make and file Affidavits of the execution of Indentures of Clerks to Attornies and Solicitors, to make and file the same on or before the first day of Hilary Term, one thousand eight hundred and thirty-six; and to allow Persons to make and file such Affidavits, although the Persons whom they served shall have neglected to take out their annual Certificates. [3d July, 1835.]

CAP. 12.—An Act for continuing to his Majesty, until the fifth day of July, one thousand eight hundred and thirty-six, certain Duties on Sugar imported into the United Kingdom, for the Service of the year one thousand eight hundred and thirty-five. [3d July, 1835.]

CAP. 13.—An Act to regulate the Importation of Corn into the Isle of Man. [3d July, 1835.]

CAP. 14.—An Act to continue to the thirty-first day of December, one thousand eight hundred and thirty-six, and from thence to the end of the then next Session of Parliament, an Act of the tenth year of his late Majesty's reign, for providing for the Government of his Majesty's Settlements in Western Australia on the Western Coast of New Holland.

[3d July, 1835.]

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## EVENTS OF THE QUARTER.

No material change has taken place in any of the superior Courts at Westminster within the last three months, which, considering the state of the highest (the Chancellor's), is a lamentable announcement to make. Complaints are heard on all hands of the inconvenience which placing the Seals in the hands of the three existing Commissioners has produced; but the government have unfortunately no lawyer properly qualified whom they can trust, and the press of other matters has hitherto prevented them from resorting to the final measure of division, as suggested by Lord Brougham. He suggested it, no doubt, under the expectation of being able to select whichever half might best please him for himself; little thinking that the almost unanimous voice of the profession and the public would so soon denounce him as glaringly unfit for either—unfit by reason of his indiscretion and bad faith for the political part, and unfit by reason of his notorious ignorance of law for the judicial one.

Most of the Bills mentioned in our last Number as pending are still before one or the other of the Houses of Parliament. Amongst these the Imprisonment for Debt Bill deserves particular mention, for clause after clause has been added to it until it presents a truly formidable mass of alteration; too formidable, we trust, for the legislature to grapple with at this season of the year, notwithstanding the unseemly haste with which the Attorney-General seems anxious to accelerate it. It may be as well, at all events, for members of parliament to know that the Bill in question goes far beyond the simple object originally proposed by it. Besides abolishing imprisonment for debt on *mesne process*, it dispenses in the great majority of actions with all the ordinary proceedings between process and judgment, thus enabling the plaintiff to spring to execution at a bound—reverses or replaces the whole known method of proceeding against debtors—and even supersedes the present country commissioners of bankruptcy, who, we should suppose, have already been changed often enough to satisfy the most ardent votary of innovation. There is now to be one circuiting judge or commissioner for each county; a plan which will probably not last a year from its commencement. It seems also that the Court of Review, the uselessness and impolicy of which have been proved to demonstration, is to be bolstered up anew, with the view of its forming part of the machinery rendered necessary by the Bill. Surely a measure of so sweeping a character should not be hurried over during the morning sittings, and at a period when most of the lawyers are necessarily absent from the House. The ample patronage the Bill proposes to vest in the government sufficiently accounts for the avowed readiness of the ministry to second the zeal of their law-officer in its behalf.

There has been a complete silence upon the subject of Local Courts, with the exception of a few remarks elicited during the debates on the Corporation Bill; from which it appears that the scheme is not so much abandoned as postponed. In the Corporation Bill itself, we are happy to find that the principle advocated in our last Number, of vesting the judicial appointments in the Crown, has been adopted. The discussion of this subject has contributed to throw light on a state of things to which we formerly adverted in illustration of the unwillingness of the people to resort to inferior tribunals so long as superior lie open to them. We allude to the

existence in numerous towns of Courts of competent jurisdiction for the trial of civil cases, presided over by judges full as competent on the average as those Lord Brougham's or any other Local Court Bill would create; in which, notwithstanding, no causes are commenced, or are commenced only with a view to their immediate removal to the superior Courts.

The Prisoner's Counsel Bill has passed the Commons by a majority of one; a sufficient proof that it was opposed to the conviction of the House; for many members voted for it with exclusive reference to its alleged liberality and popularity. It is now under the consideration of a select committee of the Lords, and will not improbably be rejected, or stand over, after all. For ourselves, we think that its importance has been greatly overrated, and that it is capable neither of so much good nor of so much evil as its advocates and adversaries contend; but we anticipate much more evil than good from it if passed. Criminal trials differ essentially from civil causes in this—that the jury have no conflicting claims to balance, no complicated questions of damages or liability to adjust: one simple question (guilty or not guilty) is submitted to them, and in nineteen cases out of twenty, this question may be answered, without hesitating, immediately on the conclusion of the evidence. Will any good result from the introduction of a new element, from exposing juries to have their own plain impressions disordered by the glosses counsel may put upon the facts? or will even the prisoner be a gainer by the privilege, with a judge released from the direct responsibility of protecting him, and a prosecuting counsel set free from the restraints imposed on this peculiar department of advocacy? The additional time, too, during which the judges will be occupied must be taken into the account, as we fear it will be found impossible to restrict the exertion of the privilege to cases of difficulty or doubt. This effect will be comparatively immaterial so long as no alteration in the system is made necessary by it; but if additional judges should be required in consequence, the whole administration of justice will suffer by the change. The expense of keeping prisoners and witnesses in assize towns will also be proportionally augmented.

Lord Lyndhurst has introduced an act for legitimatising the children of marriages within the prohibited degrees, unless the validity of the marriage be impugned within a limited period (two years, we believe,) from the celebration. At present such marriages may be impugned at any time during the lifetime of the contracting parties.

A Report from the Commissioners appointed under 1 Will. IV. c. 58, to investigate the nature and amount of Fees in the Common Law Courts, has been made public. The principal recommendations are, that the offices in the King's Bench and Common Pleas shall be consolidated as in the Exchequer, and that four masters or prothonotaries, with clerks or assistants, shall be established in each of the three courts. We shall return to the subject in our next Number.

A Second Report has also been presented by the Criminal Law Commissioners, on the subject of a suggested consolidation of the Statute Law. It is to be hoped that they have discovered by this time that they themselves are not the first or only persons to whom the notion of consolidating any portion of the Statute Law had suggested itself; that, in short, nine-tenths of the operative Statute Law of Crime have been consolidated under the directions of Lord Lansdowne and Sir Robert Peel.

## LIST OF NEW PUBLICATIONS.

The Law Dictionary, explaining the Rise, Progress, and Present State of the British Law; defining and interpreting the Terms or Words of Art, and comprising also copious Information on the Subjects of Trade and Government. By Sir Thomas Edlyne Tomlins, Knt. of the Inner Temple, Barrister at Law. The Fourth Edition, with extensive Additions, embodying the whole of the recent Alterations in the Law. By Thomas Colpitts Granger, Esq. of the Inner Temple, Barrister at Law. In Two Volumes 4to. Price 4l. 4s. boards.

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Character of Lord Bacon, his Life, and Works. By Thomas Martin, Barrister at Law. In 12mo. price 6s. cloth boards.

We shall take a future opportunity of noticing this work.

Statement of the Provision for the Poor, and of the Condition of the Labouring Classes, in a considerable Portion of America and Europe. By Nassau William Senior, Esq.; being the Preface to the Foreign Communications contained in the Appendix to the Poor Law Report. In 8vo. price 7s. boards.

A most useful and instructive compilation.

A Synopsis of the Members of the English Bar; containing their Academical Degrees, Inns of Court, Dates of Call, Courts in which they practise, Official Appointments, Circuits, Chambers, &c. arranged in Alphabetical and Chronological Order. Together with Lists of the Judges, King's Counsel, Serjeants, &c. with the Dates of their Appointments; of the Advocates, with the Dates of their Admissions; and a Table of legal Precedency. By James Whishaw, Esq. Barrister at Law. In 12mo. price 9s. boards.

This is a useful book, but not uniformly accurate. In the list of the Western Circuit, for instance, in p. 269, there are material errors.

Plain Instructions for Overseers and Electors in the Registration of Voters for Counties, Cities, and Boroughs in England and Wales. By William Henry Cooke, Esq. B. A. of the Inner Temple. In 18mo. price 2s. sewed.

A Treatise on the Practice of the Court of Chancery; with an Appendix of Forms and Precedents of Costs, adapted to the last New Orders; and an Index to both Volumes. By John Sidney Smith, of the Six Clerks' Office. Vol. II. In 8vo. price 16s. boards.

A Practical Treatise on the Law of Life Annuities, with the Statutes and Precedents: to which are added, Observations on the present System of Life Assurance, and a Scheme for a New Company, with various Tables. By James Birch Kelly, of the Inner Temple. In 8vo. price 10s. 6d. boards.

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# THE LAW MAGAZINE.

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## ART. I.—CONSOLIDATION OF THE STATUTE LAW.

*Report of the Commissioners appointed to inquire into the Consolidation of the Statute Law. Presented by command of His Majesty. Ordered by the House of Commons to be printed, 21 July, 1835.*

IN reviewing the First Report of these Commissioners, we found ourselves under the distressing necessity of dissenting from every one of the measures proposed by them; and, judging from the tone, style, and spirit of that Report, it seemed by no means improbable that we should find ourselves in an equally painful predicament as to this. We have been most agreeably disappointed in this respect, for we are enabled to concur most cordially in the most urgent of their recommendations, and do not hesitate to admit that there is no inconsiderable weight of authority for the rest.

Contrary to the commonly received custom in such cases, the Commissioners commence their Report by a statement of their conclusions:—

“ We humbly report to your majesty that we are of opinion that a revision of the Statutes, to a limited extent, would be attended with manifest advantage, to be obtained by simple, easy, and unobjectionable means.

“ We apprehend that the mere extirpation of all such enactments as are obsolete or superfluous, the rejection of repetitions of terms of frequent occurrence, and the extrication of material words from the superfluity of language by which the



law is often obscured, would greatly reduce the bulk and consequent costliness of the statute book, and would render it more accessible and intelligible to the generality of your Majesty's subjects.

"We think that such a reduction would be still more beneficial, if an arrangement were added which would render the law more accessible, without diminishing the aid for its interpretation now derived from context and order of time; and if such discretionary alterations were also made in consolidating and generalizing its enactments, and removing and supplying obvious ambiguities and omissions, as might be effected without danger of uncertainty.

"We also think that a complete and systematic consolidation, accompanied with an adjustment of the enactments to precedent and judicial decision, is practicable and desirable; but so extensive a reform, however beneficial, could not, we are aware, be safely accomplished without great pains, nor ought it to be attempted without cautiously weighing the means of performing so arduous a task, and steadily contemplating the difficulties to be encountered in its execution.

"Having thus, at the outset, stated generally our conclusions, we proceed to examine in detail their reasons and grounds."

They begin by a recapitulation of former projects for a revision of the statute law, mostly taken from Mr. Cooper's valuable work on the Public Records. From this recapitulation, it appears that from Elizabeth's time downwards, projects of this kind have been repeatedly under the consideration of the legislature, and that on the list of their propounders or favourers, may be placed the names of Bacon, Hale, Coke, Blackstone, Wood, Daines Barrington, &c. &c. In 1806, also, the Commissioners of Public Records engaged Mr. Hargrave to prepare a report as to the best method of reducing, systematising, revising and amending the statute law, though from some unexplained cause the undertaking was eventually abandoned; and in 1816 the House of Lords came to two resolutions declaring the expediency of arranging the enactments in the statute book under distinct heads, to which the House of Commons assented.

North America is perhaps the only country in the world

whose example can be plausibly adduced, and it is thus brought to bear by the Commissioners:

“ We are fortunate in having an example from which we may estimate the advantages likely to result from a revision and consolidation of our statute law, in the labours of the commissioners recently appointed by the State of New York, to revise the statutes of that country; and we have reason to believe, that the task assigned to those commissioners has been executed with great skill. We have added, in the Appendix, No. 3, the commission under which these gentlemen acted, together with their preliminary Report, which, we think, shows that they were fully competent, both to estimate the difficulties, and to appreciate the advantages likely to result from the performance of their arduous undertaking. The difficulties and objections arising from a mass of inconsistent and obscure statutory provisions appear also to have been felt by the state of Massachusetts, and consequently a commission has been appointed by the Legislature of that State for the purpose of revising the Statute Law; and from the parts of the work already executed, which we have had an opportunity of inspecting, we consider that there is every just reason to suppose that the change will be advantageous.”

As an incidental confirmation of their views, they cite the various acts passed for the consolidating particular branches of the law—as Sir Robert Peel’s acts for the amendment of the Criminal Law, the Ship Registry Act, and the acts relating to trade, commerce, and customs—with the remark:

“ We may in this place observe, that although such partial consolidation must, of course, be beneficial in removing the inconveniences arising from a multiplicity of statutes relating to one subject, it may, we think, be assumed that a revision and consolidation, conducted on a general plan, and according to a systematic arrangement, would produce far more beneficial results than can possibly be derived from partial and successive alterations.”

This is begging the whole question, and reminds us of Mathews’ well known fallacy—if one gingerbread nut will warm you for a month, what will a pound do? The Com-

missioners class the rest of their observations under the heads following:

I. The Imperfections of the Statute Law in its present state. II. The Remedies. III. The application of Remedies; which is much the same as if a medical report should be divided into—1. The disease. 2. The physic. 3. The taking of physic.

We ourselves have already taken two or three occasions to point out the imperfections of our statute law, which indeed we have never met with any one hardy enough to deny. We may, therefore, content ourselves with a brief summary of the observations ranged under this head in the report.

“The principal imperfections in the present state of the Statute Law are such as render it less accessible and intelligible, and of less easy application than is expedient, when it is viewed either as a rule of conduct or as the basis of future legislation.

“The Statute Law is rendered less accessible by its now extraordinary bulk, the result of an accumulation of enactments during the space of more than six centuries, without any effectual systematic effort to reduce the aggregate by a general consolidation; so that the number of public statutes now in force, together with many expired and repealed statutes and enactments at present printed in the collections in common use, occupy not fewer than 30 closely-printed quarto volumes, containing from 600 to 1200 pages each, and costing from 30*l.* to 40*l.*

“The Statute Book is further encumbered with numerous provisions, which, from the change of manners, have in effect, though not in law, become obsolete. These amount to nearly three hundred; among them may be enumerated many laws relative to villenage, husbandry and particular manufactures.”

The titles of about forty obsolete acts are subjoined as a specimen in a note. Most of these, it must be owned, have been very properly permitted to die away out of use; but perhaps two or three of them might be advantageously revived. For instance:

“1 Hen. VI., c. 3. All persons born in Ireland (except as in the act mentioned) to quit the kingdom, within one month after procla-

mation made, upon pain of forfeiting their goods and being imprisoned at the king's pleasure."

Or, should this be thought a shade too strong, the following :

"2 Hen. VI., c. 8. Irishmen resorting into the realm shall put in surety for their good abearing."

"Clauses in prior Acts, and even whole Acts, (they continue,) are often unnecessarily recited in subsequent statutes. There are several, the titles of which alone, have been so often recited that they would amount in bulk to a statute of considerable size; and a number of instances might be adduced where the reciting part of a statute occupies twice or three times the space of the enacting part. The preambles of some of the more ancient statutes contain much declamatory and superfluous matter; some of those affixed to statutes passed in the reign of King Edward VI. are particularly objectionable in this respect.

"From the charge of redundancy of expression, few modern statutes can claim exemption. In many instances such superfluities are attributable to an adherence to precedents founded upon no apparent reason. There are numerous instances of neglect of economy in the wording of statutes, which might appear trivial, if their frequent repetition did not give them a considerable degree of importance by materially increasing the size of the statute book, as when not only the statute itself, but even particular clauses, are prefaced with the words, 'Be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same,' &c.; and are sometimes also concluded by an unnecessary corroboration that they are to be enforced, 'any thing in any act or acts, or any construction or implication from any act or acts, or any usage or custom to the contrary in anywise notwithstanding.'"

Admitting the general justice of these criticisms, it really strikes us that zeal against redundancy is here pushed to the very verge of absurdity, and we should have thought that none but Mr. Joseph Hume, or the miser who boasted of having effected a saving in ink by omitting the dots over his i's and the crosses in his t's, would have gravely proposed to

economise by striking off the formal commencements and conclusions of Acts. The following extract, we presume, refers to a total exclusion of verbosity :

“Retrenchments such as these cannot be deemed to be immaterial, especially when considered in conjunction with others of a similar nature, when it is considered that from the mere rejection of these and some other merely formal words of constant occurrence, a reduction to the amount of at least two quarto volumes would probably be effected. This however would constitute but a small portion of the whole reduction, which might be attained by the expurgation which we recommend, and which we conceive would reduce the statute book to one-fifth of its present size; and this, it must be remarked, is independent of the further reduction which might be safely accomplished by the generalization and consolidation of enactments.”

It is stated (in connection with the argument that the statute law is rendered less accessible than it ought to be by its magnitude and costliness) that there are many statutes on record which have never been printed in the ordinary editions, as well as many statutes in print no record of which is to be found, and (as a consequence of the irregular mode of printing and recording statutes) that it is frequently a matter of doubt whether a supposed statute ever had the force of law. They instance Lord Macclesfield's case (State Trials, vol. 6.) and the case of the Southampton election (Douglas, vol. 4, p. 87.) It is not yet settled how far the title of an act is to be considered a part of it, and the various and often obscure or indirect modes of repeal add greatly to the difficulties of research.

“Sometimes there is a general repeal of a class of statutes ‘as far as the same are inconsistent with the new statute,’ leaving it often in doubt how far the repeal extends. The same acts are sometimes repealed, first by one act and again by another, or first by one section and again by another section of the same act. The same acts are sometimes repealed partly by one act and partly by others; and occasionally partly by one section and partly by other sections of the same act; making it also frequently a question whether the whole amounts to a partial or to a total repeal. A cursory

examination of the index to the statutes, stated in the appendix, No. 1, will show the numerous doubts arising from this source."

Again, "In some instances, for want of a general rule or particular legislative declaration, doubts arise on the question, whether a new statute is to have a retrospective, or merely a prospective operation. In others, whether a statute has been repealed as to penalties in respect of offences committed whilst the act remained in force.

"In the case even of statutes unquestionably in force, doubts, for want of clear and definite rules upon the subject, have frequently occurred on the questions, whether a particular statute is of a public or private nature; whether it is of a general and unqualified, or of a mere limited operation; whether it is intended to supersede the common law, or to have a cumulative effect. In the *King against Carlisle* it was held, but not without much controversy, that the statute of the 9th and 10th of King William III. inflicting penalties for blasphemy, was cumulative, and that the offender was still punishable at common law.

"So, on the other hand, it is sometimes matter of doubt whether a statute of a private, or partly of a private nature, in giving authority to do certain acts, thereby supersedes the common law, by exempting parties from the general liabilities to which they would otherwise be subject. A question of this kind was lately discussed in the case of *The King v. Pease*.

"Doubts also frequently arise as to the local operation of a statute, as, for instance, whether certain parts of the kingdom, as Ireland, Wales, Scotland, Alderney, &c. are or are not within their operation. We have further to remark, that the defining of the local limits within which a statute is to operate has occasioned much needless repetition, the necessity for which might be avoided by laying down a few general rules."

Many of the older statutes are obscure from the nature of the language, which down to the reign of Edward IV. inclusive, was invariably Latin or Norman French. Translations are commonly annexed, but these frequently differ from

each other, and there is none which bears the stamp of legal authority.

“The imperfections in the statute law (say the Commissioners) arising from mere generality, laxity, or ambiguity of expression are too numerous and too well known to require specification. They are the natural results of negligent, desultory and inartificial legislation: the statutes have been framed extemporaneously; not as parts of a system, but to answer particular emergencies as they occurred. Equally well known is the fact that the unconnected and dispersed state of the statute law is the occasion of great inconvenience, for particular attention was called to it by Sir Robert Peel in introducing the first of his Consolidation Bills.”

The 23 Geo. II., c. 26, is given in illustration. The two last of the multifarious objects comprised in the title are “to prevent the stealing and destroying of turnips, and to amend an act made in the second year of his present majesty for the better regulation of attornies and solicitors.” The other objects (ten in number) bear about the same degree of affinity to each other as the two last.

“A statute which relates specially to a particular class of subjects, as, for example, to the poor, church leases, legacy duties, or the like, may often mislead the inquirer, if he does not refer to all the statutes of the same class, wherever they may be found dispersed throughout the statute book; for though made at different times, and not referring the one to the other, and though some may have expired, it is frequently held that all such acts made *in pari materia* are to be called in aid for the purposes of interpretation and construction.

“Such being the rule of law, it follows that the collection and arrangement of dispersed enactments relating to any particular subject is an almost indispensable step to the understanding of the law, where its provisions are numerous. What is now defective in this respect is to be supplied by private diligence and exertion. If, even at great expense and by great labour, an uniform and consistent rule could at last be extracted, mere want of arrangement would not be productive of so much inconvenience as is at present experienced; but unfortunately, the removal of this defect often discloses

errors and inconsistencies which become apparent upon the juxta-position and comparison of dispersed enactments."

The next topic is, the difficulties that arise from the various modes of legal construction and interpretation, as applied to the existing statute law.

"The object of the technical rules for the construction of the Statute Law, that is, the carrying into effect the intention of the legislature, must be defeated, unless the law be framed as well as construed in reference to those rules. If terms in the framing of statutes be used in a popular sense, without regard to the technical rules devised for their construction, whilst the public are misled, the intention of the legislature must frequently be defeated.

"In illustration of the singular consequences which sometimes result from imposing technical constructions on popular enactments, we may refer to a late decision, by which it was pronounced that bulls were not cattle. The question arose on the statute 3d of King Geo. IV. c. 71, for preventing cruelty to animals, which enacted, 'That if any person shall wantonly and cruelly beat, abuse or ill treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep or *other* cattle,' such person should be punished as in the act is mentioned. The question was, whether bulls were cattle within the concluding words of the clause; and it was held, agreeably to a well known technical rule of construction, that bulls were not cattle."

The late Mr. Richard Martin of Galway, with whom we believe the act originated, was one of the first to doubt the application in question, founding his argument on a statute mentioning deans, rectors, vicars, and other clergy, which was held not to include bishops, on the ground of their more exalted dignity. Now, said Mr. Martin, bulls bear about the same relation to other cattle, that bishops bear to other clergy, and therefore the same rule of construction will hold good.

It is next objected, and with truth, that the rules for construing statutes are extremely inconsistent and vague. Penal and remedial statutes, for example, are construed upon wholly different principles. "The construction of acts of parliament, also, is sometimes affected by the punctuation and by the division into sections. As these helps to construction are not



deemed part of an act, and have occasionally been shown to be erroneous, (of which an example occurs in *Rex v. Newark*, 3 B. & C. 71,) they appear to require revision, and to be settled by authority."

"We have yet to observe that a great, perhaps the greatest, inconvenience incident to the present state of the Statute Law, is the modification, and, in some instances, the direct contravention of its provisions by judicial decisions. To such an extent has this evil proceeded, that on some subjects a series of such decisions has almost superseded the authority of the written law.

"It was observed by Lord Kenyon, 'that if Courts were to decide upon the express words of the 13th and 14th of King Charles the Second (relating to parish settlements), they would overturn 99 cases out of 100, determined upon that statute.'

"And the Courts have often expressed themselves as being bound by precedent in cases where, if the question had been *res integra*, they would have adhered to the plain terms and obvious meaning of a statute. The Statute of Limitations in particular, though one of the most wholesome laws in the whole Statute Book, had so nearly been repealed by judicial constructions, that it became necessary to restore its effect by a Supplementary Law.

"Some of the most important rules relating to the administration and devolution of property rest on decisions of the Courts, which are directly at variance with the Statute Law. The means by which parties, until the late statute, were enabled to bar entails, may be cited as a remarkable instance in confirmation of this position. Mr. Butler, in his preface to the 13th edition of Coke upon Littleton, speaking of the Statute of Entails, observes, 'Entails, from their first establishment, were greatly discountenanced by courts of justice, and they were eluded by the doctrines of discontinuance and warranty.'

"An experienced conveyancer (Mr. Tyrrell) has observed:— 'The effect of a written law in this country has usually been confined or evaded by questions respecting the meaning of its words. The spirit has been allowed to be destroyed by the letter. In the construction of the Statute of Uses, which con-

tains the expression of 'One person seised to the use or trust of another,' it was determined that a corporation could not take an estate to an use; that the statute did not apply to copyholds or leaseholds, because persons are not said to be seised of them, and that a use upon a use, as a gift to one to the use of another, in trust for or to the use of a third, was not within the statute. Because the Statute of Wills contains the word 'having,' it is restricted to the property which a person has when he executes his will, and prevents him from disposing of the estates which he may be entitled to at his death."

In some cases the Courts of Equity have openly disregarded the strict letter of enactments, as in the instance of the Registry Acts, which provide that deeds shall be adjudged void as against subsequent purchasers, unless a memorial shall have been registered. The Courts of Equity hold that if the subsequent purchaser knew of the unregistered deed, it shall notwithstanding take precedence of his own.

"The difference (say the Commissioners) which thus exists between the obvious import of the text of the Statute Book, and its practical operation as varied by judicial decisions, is so great, as to render the mere perusal of the written law in many instances of little use to the inquirer, and it may not unfrequently mislead him. *It is to be observed, however, that this inconvenience is not necessarily inseparable from a written or Statute Law.* It has arisen in this country, in a great degree, from the imperfections of the principles adopted in framing Acts of Parliament, and from the neglect of the legislature, especially in early times, in not interfering in cases where the law was manifestly obscure or imperfect, and adapting their written laws to the changes of manners and wants of the times. Courts of justice have thus been induced to resort, under different circumstances, to various pretexts, in order to give effect to what they conceived was the object of a law, or by the aid of judicial construction to remedy what they considered were the errors or omissions of the legislature."

The observation in italics is probably directed against an ordinary and, we believe, perfectly well founded objection to codes; the mere perusal of which is commonly of little use to the

unlearned inquirer consulting them with a view to the practical application of the text. The remarks immediately following are just :

“ To the attempts thus made to supply and remedy such omissions and imperfections great inconvenience is attributable. No sooner is the plain letter of the law overstepped, for the sake of remedying defects by the aid of artificial extensions and strained constructions, than a multitude of evil consequences arises.

“ The law itself becomes indefinite and uncertain; it is impossible to determine the limits of such constructive extensions. Experience shows that different minds will apply very different principles for the purpose, and the construction of statutes will necessarily vary according to fluctuating notions of general policy. It would however, be an useless and irksome task to enter into specific details of all the inconveniences to which such practices have given rise. It is remarkable, that the desire, not unfrequently expressed in modern times, to adhere more closely to the plain and obvious letter of the law, has been productive of the uncertainty necessarily resulting from the impossibility of knowing *a priori* what principle of construction is to prevail; whether in the particular case, practice and precedent have sanctioned a series of constructions, inconsistent with the expressed intention of the legislature, or whether its enactments are to be carried into effect according to the plain and natural meaning of their terms.

“ It was formerly held that if a statute was against common right or reason, or contrary to natural equity, the common law had power to control it, and even to adjudge it to be void.

“ Lord Hobart, in commenting on cases where the same words of forfeiture had met with different expositions, observes: ‘ So there is a corruption, or no corruption, for several reasons in several cases upon the self-same words of forfeiture. For there is no word in the stat. of 26 Hen. VIII. of corruption of blood in either case. If you ask me, then, by what rule the judges guided themselves in this diverse exposition of the self-same word and sentence, I answer, it was by that liberty and authority that judges have over laws,

especially over Statute Laws, according to *reason* and best *convenience* to mould them to the truest and best use.'

"We think it improbable that any Court of Law or Equity at the present day would admit so great a latitude of construction, in respect of any new statute, as was formerly allowed; but we conceive that there are many instances in which the Courts would pronounce that the question of construction was no longer *res integra*; and that, on the ground of mere precedent and usage, a construction would be allowed to prevail inconsistent with that which must have prevailed had the matter been *res integra*. Laxity of construction has created this dilemma. Great uncertainty, and therefore great mischief, would result from a disregard of that mode of construction which had been sanctioned by a series of decisions: however erroneous those may appear to have been, they afford the only rule of conduct on which the lawyer can advise, or his client act; on the other hand, the practice of adhering to a series of precedents, in opposition to the written law, makes it difficult, as we have already observed, to judge *a priori* whether practice and precedent will be deemed to have acquired a force sufficient to prevail against the letter of the statute."

In some instances, it is added, a single decision has been held binding: in other instances a multitude of previous authorities have been overruled.<sup>1</sup>

The following passages are intended to lead to an important inference, against which we must take the liberty to protest.

"Lord Bacon has remarked, that more frequent doubts arise on the statute than on the unwritten law; a result no doubt attributable in the first instance to the defects in framing the statute law; and, secondly, to the lax mode in which the Courts were in the habit of construing statutes in order to get rid of what were deemed to be imperfections, by moulding the written law according to their own views. Independently of the accidental causes to which we have now referred, the *litera scripta* possesses such manifest advantages in point of clearness and certainty over unwritten law, as almost to exclude a comparison of their excellence and

<sup>1</sup> See *Fayle v. Bird*, 6 B. & C. 581; and *Balme v. Hutton*, 2 Y. & J. 101.

utility. In order to the decision of a case by the unwritten law a double process is essential: a rule must be extracted from the general mass of decisions, and that rule must then be applied in the particular case; but a failure may occur, either in not extracting the true rule or in not properly applying it when extracted. In the case of a written law the process is more simple, and consists merely in the application of the rule, unless, indeed, the written law be so obscurely expressed that it induces the necessity, as in the case of unwritten law, of a preliminary process to determine what the rule itself is."

What is here asserted of the superiority of what, *par eminence*, is called written law, is notoriously contrary to the fact; and it will be found, on referring to Bacon, that his authority is not to be explained away so easily. The "double process" distinction is an empty parade of logic, involving so clear a fallacy, that the Commissioners themselves were obliged to qualify it by a saving clause, (*unless, &c.*) which completely negatives the main inference; for the great objection to written law is, that it not only induces the necessity of a preliminary process to determine what that rule is, but that the process is generally much more difficult with regard to the written than the unwritten law. It is easy enough to say that language, perfectly exclusive of all doubt, should be employed; but when we find a man like Lord Tenterden, unable to frame an enactment of eight or ten lines without leaving the meaning open to a multitude of doubts,<sup>1</sup> we must take the liberty of thinking, with Lord Bacon, that there is something in the nature of language, or some essential inherent difficulty in law-making, which renders imperfection inevitable. We proceed with our extracts:

"Another and very important species of defect in the Statute Law remains to be noticed, although it constitutes a defect rather in the principle of the law than its technical enunciation; viz. that its practical operation is sometimes uncertain from want of plain and definite limits, or where, although the limits be themselves plain and definite, they

<sup>1</sup> We allude to the Act to amend the Statute of Limitations. The Statutes of Frauds and the Poor Law Acts afford abundant evidence of the doubts arising upon the Statute Law.

do not, from their nature, admit of easy and certain proof. Such is frequently the case where a right, obligation or offence is made to depend on notice, knowledge or particular intention, the proof of which is often attended with great difficulty. These observations are of course applicable in those cases only where a precise limit of easy application can be laid down, without incurring inconvenience, or the risk of doing injustice from its peremptory application. As an instance of the inconvenience arising from a rule of difficult and uncertain application, we may refer to the former Bankrupt Law, in the construction of which it was held that the assignees of the bankrupt might, under certain circumstances, recover money or goods delivered by the trader on the eve of bankruptcy, and in contemplation of bankruptcy: the various and undefinable circumstances which are involved in such a question, tended to make such inquiries difficult, and their result uncertain, and to occasion much litigation. The inconvenience is in part removed by the late statute, which makes a mere fraudulent preference to constitute a substantive act of bankruptcy.

“ We cannot close this branch of the subject without advert- ing to the inconveniences arising from the various provisions contained in the numerous local and personal acts passed every session; the provisions of which are often even less attended to than those of general acts: from the same provisions or rules being differently, and often imperfectly, expressed, much useless litigation takes place. We have appended, as a note, an extract from the Treatise addressed to His Majesty’s Commissioners on the Laws of Real Property already cited, which affords some useful information on this point.

“ In the execution of the important task confided to us, we have thought it our duty to lay before Your Majesty a statement, somewhat in detail, of the defects of the Statute Law. The defects which we have noticed may be considered the most striking; but, fearing to render our Report too voluminous, we have abstained from referring to many others of considerable importance; some observations, however, illustrative of our preceding remarks, and more particularly regarding the statutes relating to the poor and to costs, will be found in the Appendix, No. 5.”

Having laid before our readers a sufficient abstract of the Commissioners' account of the evils, we proceed to a statement of the remedies proposed by them :

“ II. REMEDIES.

“ These may be classed as follows :—

“ 1st. The rejection from the statute book of enactments which have been directly or indirectly repealed, or which are obsolete or otherwise superfluous; and the rejection of all unnecessary words and phrases.

“ 2dly. The classification of the now dispersed enactments under appropriate heads, according to some systematic arrangement.

“ 3dly. *The removal of inconsistencies, whether they be merely apparent, or arise from a conflict in principles.*

“ 4thly. The generalizing and consolidating of enactments.

“ 5thly. The substitution of plain and certain words, where the language of an enactment is ambiguous; *and the defining such terms (particularly terms of art) as are in most frequent use, in order that the same word may be always used in the same sense, and that the same thing may be always signified by the same word.*

“ 6thly. *The altering of enactments so as to make their apparent sense and meaning correspond with their legal effect.*

“ 7thly. *The statement of technical rules governing the construction of statutes.*

“ We may remark, that these remedies for the defects of the Statute Law accord, for the most part, with the following suggestions of Lord Bacon in that part of his “ *Proposal for amending the Laws of England*,” which relates to the reforming and recompiling the statutes :

“ ‘ 1. The first, to discharge the books of those statutes, where the case, by alteration of time, is vanished ; as Lombards, Jews, Gauls, Half-pence, &c. Those may nevertheless remain in the libraries for antiquaries: but no reprinting of them. The like of statutes long since expired and clearly

repealed ; for if the repeal be doubtful, it must be so propounded to the parliament.

“ ‘ 2. The next is, to repeal all statutes which are sleeping and not of use, but yet snaring and in force ; in some of those it will perhaps be requisite to substitute some more reasonable law instead of them, agreeable to the time ; in others, a simple repeal may suffice.

“ ‘ 3. The third, that the grievousness of the penalty in many statutes be mitigated, though the ordinance stand.

“ ‘ 4. The last is, the reducing of concurrent statutes, heaped one upon another, to one clear and uniform law.’ ”

We submit that Lord Bacon's suggestions are by no means co-extensive with those of the Commissioners ; and we think that so much of their plan as we have printed in italics is unnecessary ; as indeed they themselves will presently be found partially admitting.

In proof of the number of repealed and useless statutes, the Commissioners refer to the edition of the Statutes published under the Record Commission, which professes to contain all the existing statutes and charters from the earliest times to the end of the reign of Queen Anne. Of the statutes enumerated in this edition, there are—

“ 1. Repealed .....	658
2. Repealed in part .....	260
3. Indirectly repealed, or repealed by implication	142
4. Obsolete .....	234
5. Expired, .....	780
	<hr/>
	2,074”

A systematic arrangement, in preference to an alphabetical one, is proposed :

“ With a view to classification, it may be remarked that most of the digests adopt an alphabetical arrangement ; but such an arrangement, however well it may be suited to the purposes of casual reference, would not, we think, be sufficiently systematic.

“ Of systematic arrangements, that which is most simple and natural, is likely to be the most practicable and effectual ; and the most simple and natural division of laws is, we conceive, that which is suggested by the leading objects of jurisprudence.



“ The primary object is the definition of public duties and private rights ; the second, which is auxiliary to the first, is the prevention or remedying violations of the duties and rights so defined.

“ The first branch of the laws which define public duties and private rights naturally consists, first, of such as concern the public in general ; secondly, such as regard the rights of individual members of society, in their lives, liberty, reputation and property. Such laws again as concern the public, relate either to the political constitution of the state ; security from foreign aggression and internal commotion ; the maintenance of peace and good order ; the providing and securing all those advantages and conveniences which the exigencies of mankind in a civilized state require, in order to the free exercise of religion, commerce, and for all purposes of mutual intercourse ; and the duties of legislative and executive functionaries invested with powers for carrying such provisions into effect.

“ This branch of the written law which concerns the public in general might, perhaps, be commodiously distributed into the following general classes :

“ 1st. Such statutes and charters as concern the political constitution of the realm, the legislative and executive powers and duties, the royal prerogative, the constitution of parliament, and all fundamental laws and ordinances which regard the different estates of the realm ; and its public functionaries ;—or,

“ 2dly. Its public revenues ;

“ 3dly. The army and navy ;

“ 4thly. Ecclesiastical affairs ;

“ 5thly. Public rights of property, ports, bridges, highways, and all other such public rights ;

“ 6thly. Navigation and commerce ;

“ 7thly. The administration of justice ;

“ 8thly. The maintenance of the poor and impotent.”

We see no objection to a systematic arrangement so far as the laws of a public nature are concerned, but we doubt whether laws concerning private rights will be found susceptible of any arrangements of the kind. As to these it is observed :

“ The second branch consists of such laws as concern private rights in respect of life, liberty, reputation and property.

“ The auxiliary division of the laws would embrace all such as were either of a preventive or remedial description; the former comprising all penal laws, the object of which is to prevent crimes by the threat of punishment. One branch of such preventive laws would contain the definitions of crimes and punishments; another the process of accusation, inquiry, judgment and execution, either in the ordinary course of criminal proceeding, or in a summary way before inferior magistrates, and also all police regulations.

“ The remedial branch would embrace, first, all such enactments as relate to civil remedies to be sought for and obtained in courts of justice, or by acts of the parties; and secondly, such as concerned civil tribunals, and all the details of civil procedure.

“ Some laws, although principally of a remedial, are partly also of a penal nature; the penal provisions being added in order to carry the remedial intention into effect. Such are the Bankrupt Laws, the great object of which is to afford to the creditors of an insolvent trader a more effectual remedy in certain cases. Such also are the Insolvent Laws, which in principle are a branch of the remedial law; being intended to limit the consequences of the general right of the creditor to imprison the person of his debtor, where the continuance of imprisonment would be too rigorous.

“ In pursuing an arrangement founded on general principles, doubts may sometimes occur, whether particular enactments belong to one branch rather than another. Thus the Bankrupt Laws depend on the remedial principle, the object being to give a summary and more effectual remedy, in certain cases, to the creditors of an insolvent trader. But in order to carry this into effect, penal provisions are essential, which belong to another branch of the auxiliary law, and are founded on the preventive principle:—is the arrangement to be determined by the immediate principle, which is the remedial one, or ought such penal provisions to be detached from the rest of the provisions concerning bankruptcy, and ranked with other penal laws?

“ This seems to be matter of discretion in each particular

case, depending on a comparison of the convenience which might result from comprehending all the rules concerning a particular subject matter, such as bankruptcy, in one complete and separate branch, with the convenience which would result from a strict adherence to systematic arrangement."

The convenience of systematic arrangement would be, in our opinion, very far inferior to the convenience of a classification which should bring all rules relating to the same subject under one and the same head. One strong argument against systematic arrangement is suggested by the first paragraph of our next extract :

" An apt distribution of the Statute Law under particular heads, with reference to the convenience of various classes of persons, would be advantageous by affording an easier and cheaper access to such particular branches of the law as their peculiar exigencies required.

" It would be convenient that all the statutes or charters which concerned the general constitution of the realm should be collected and preserved separately, without alteration, as a distinct branch of the Statute Law.

" With respect to such enactments as concern real property, it would be necessary to use the greatest caution in making alterations which could possibly affect titles. With regard to some of the most important, on which a vast body of judicial law has been engrafted, such as the Statute of Uses, we conceive that it would be inexpedient to make any change. The Act for the abolition of Fines and Recoveries, and the Act for the Limitation of Actions, with some other recent statutes, fully prove, however, that with due care the dangers attending this part of the Digest might be effectually avoided."

It should be remembered, however, that these acts were prepared by some of the ablest real property lawyers of the day, and with a degree of care and caution which it would be impossible to devote to each of a larger body of enactments. Neither is it yet quite clear that no doubts will arise upon these acts. The danger of such alterations appears to have been more duly appreciated by the Commissioners appointed to revise the statutes of New York :

“ With respect to the class of statutes falling under the second general division, the difficulties to be met, and the caution to be exercised, are much increased by the considerations that most of those statutes affect titles to property, and that almost every line of them has been the subject of judicial interpretation. Many of our professional brethren, for whose opinions we entertain the highest respect, are averse to any, even the least alteration in their phraseology or arrangement, lest rules of property should be altered, and decisions overturned.”

The expediency of the following recommendations, also, is by no means self-evident :

“ In other instances, and especially where the effect of enactments was merely prospective, and where the plainness and certainty of the rule constituted its chief merit, less scruple would be necessary in making alterations in other respects advisable, especially where more simple and general rules might be advantageously substituted for such as are now numerous and complicated.

“ With regard to the generalizing and consolidating of enactments, we may remark that a great saving may be effected in the number and extent of the existing statutes, by combining a multiplicity of particular provisions under more general and simple rules.

“ In some instances the necessity for contravening an inconvenient rule of the Common Law has introduced a multitude of special enactments, although the object would be more simply and effectually attained either by general exceptions, or by a total extinction of the Common Law rule. Thus the Common Law rule in the case of theft, that neither any portion of the realty, nor any thing which savours of the realty, can be the subject of larceny, has given rise to a multitude of statutes instituting numerous exceptions in particular instances. These have been collected and enacted in one statute; but we are inclined to think that the more simple and effectual course would be to repudiate altogether the Common Law distinction, which requires to be counteracted by so many particular exceptions. To this point, and others of a like nature, we shall have occasion more particularly to advert in our subsequent Report on the Criminal Laws.

“ We think that the substitution of general rules for a mul-

tiplicity of minute and particular enactments, encumbered with a number of useless varieties in the mode of application, would be attended with great advantage in rendering the law more simple, more efficacious, and much more compendious. It is not our intention at present to enter upon a detail of the various branches of the Statute Law susceptible of such improvements; but we may, by way of illustration, refer to the laws relating to masters and servants in different branches of trade and manufactures. At present, a number of multifarious and particular rules exist for the regulation of masters and workmen in various trades; the modes of proceeding under these different statutes vary considerably from each other; and it is probable that great advantage from consolidation would be derived.

“Again, we may observe, that in numerous cases special and particular provision is made for enforcing enactments by penalties to be inflicted by means of summary processes; in some instances, statutes have been found to be inoperative for want of special clauses for the enforcement of the attendance of witnesses. It appears to us that such failures would be avoided, and the necessity for continual repetitions of legislative enactments for such purposes would be obviated, and that summary proceedings would be much facilitated, by prescribing simple and general forms, which should be applicable whenever any penalty or forfeiture was imposed.”

The great extent to which the amount of legislation might be beneficially reduced, by legislating generally and in gross, instead of individually and in detail as heretofore, was pointed out by Mr. Miller, in his able “Inquiry into the Present State of the Statute Law of England;” and if this mode of reduction is to be applied only to the description of statutes mentioned in the above extract, it may, perhaps, be advantageously applied. But its operation will be prospective merely. The chapter of Remedies closes with a statement not altogether in accordance with the facts:

“Defects arising from too confined and particular a method of legislation, were formerly far more common than such as consisted in an excess of generality. Either extreme is undoubtedly inconvenient; the former confining the statute within too narrow boundaries; the latter leaving its limits undefined, and rendering its operation uncertain. Whilst

both of these faults are attributable to want of legislative skill, the former is much more frequently than the latter, that of early and inexperienced legislators; who are naturally much more likely to confine their enactments to particulars than to frame general rules, which require a degree of experience which cannot, and a power of abstraction which seldom does, appertain to very early periods in the advancement of legislative skill."

That modern legislators possess a greater degree of experience, and higher powers of abstraction, it is very far from our intention to deny; but, in England at least, they have certainly shrunk from applying them, and consequently stand chargeable with an undue attention to particulars far more than their comparatively unlettered predecessors.

We now come to the third division of the Report, entitled *The Application of Remedies*; which appears to be neither more nor less than a restatement and reconsideration of the remedies themselves.

### " III.—THE APPLICATION OF REMEDIES.

" Having considered the remedies for the defects of the Statute Law, we proceed to examine the modes in which those remedies may be applied, and also the extent to which it may be expedient to apply them. There are, we think, three modes in which they may be applied. The first and most limited application of these remedies would consist in,

" A mere reduction of the existing statutes by expurgation.

" A second and more extensive application of them, would consist in,

" A similar reduction, with a classification and consolidation of the remaining enactments.

" A third, and still more extensive application of them, would consist in,

" A similar reduction, classification and consolidation, with such alterations in the remaining enactments as would make their apparent import correspond with their legal effect.

" 1st. With respect to the method first proposed, the process of reduction, as we have in substance already remarked,

would consist in the extirpation of all enactments which have been directly or indirectly repealed, or which are obsolete or otherwise useless; and in the rejection of the superfluous words and phrases which now occupy a considerable portion of the Statute Book.

“To this process of reduction might be advantageously added a classification of the Statutes according to their respective subjects, *i. e.* as they relate to the clergy, the poor, executors and administrators, &c.

“No arrangement of a more systematic character would be advisable, supposing that a plan of mere reduction were adopted: a more perfect arrangement would render it necessary that the enactments of the existing Statutes should be dispersed and transposed; the aid now derived for the construction of Statutes from a consideration of the order, date, and connexion of their different enactments would be lost; and for the purpose of restoring the broken connexion, suppletory provisions would often be necessary. The arrangement which we should recommend, in the event of proceeding on the principle of mere reduction, would consist simply in such a classification of the Statutes remaining in force, according to the more obvious and popular divisions of subjects, as would leave the benefit, which is now derivable, in point of construction, from order of time and connexion of enactments, wholly untouched and uninjured.

“We believe that the reduction which we have now suggested would not be attended with any inconvenience, and might be effected with perfect safety; and we think, that, if it were not deemed expedient, at present, to attempt a more complete consolidation of the Statute Law, a consolidation to this extent, at least, ought to be accomplished. It would diminish the bulk and costliness of the present Statute Law, would render it more accessible than it now is, would obviate the danger arising from repealed and obsolete matter, (not easily discoverable to be such in the printed editions of the Statutes,) and would facilitate the execution of a more perfect consolidation, should such be attempted at any future period.

“The kind of arrangement also which we have recommended, would be attended with beneficial effects in bringing into juxta-position all Statutes in *pari materiâ*, whereby their

bearing on each other would be made more obvious; in placing the incongruities of the Statute Law in a more striking light; and in enabling persons to find with less trouble the statutory provisions upon any particular subject."

Had the Report stopped here, the Commissioners might confidently reckon on an almost unanimous concurrence in their views; but they are not satisfied with this limited though safe improvement, and are anxious to try their hands at a much more comprehensive scheme of legislation.

However, they have at least saved us the trouble of discussing the second of the above-mentioned remedies, or (as they would say) of the above-mentioned applications, by candidly admitting its inexpediency:

"2d. According to the method secondly proposed, the enactments of the Statutes would be brought into a systematic form, but would not be adjusted to precedent and judicial construction.

"The process now under consideration would comprise the reduction which we have recommended above, with a systematic arrangement of all the remaining enactments. It would also comprise the removal of apparent and real inconsistencies; the supplying of obvious omissions; the generalizing of enactments, wherever a general enactment could be substituted for a multitude of particular ones; and, lastly, the defining of terms, with the statement of rules of construction, in the manner already suggested.

"A reduction with a consolidation, conducted on the principle which we have here suggested, that is, upon the notion of confining the process to the present Statute Book, without taking into account the numerous qualifications, and even contradictions, which regulate and modify its practical operation, would, we think, be attended with such inconveniences as to render it, upon the whole, inexpedient.

"In the first place it would be attended with all the inconvenience consequent upon any material change in the terms of the law; and secondly, it would leave unredressed the serious evil that the letter of the written law does not express the meaning of the legislature as expounded by the courts, and that to understand the written law it is necessary to resort to a mass of precedents and legal decisions which attribute a



technical sense to the words of a law, frequently at variance with their apparent import. A difficulty not perhaps altogether peculiar to this process would consist in the doubt which would so frequently present itself, whenever a change of expression occurred, whether it was intended to alter the law itself, or merely to introduce a more compendious expression of the same law."

This plan, therefore, is fairly disposed of, and we have now only the third upon our hands :

" 3d. The method thirdly suggested would include the reduction and other alterations enumerated in the last section ; and it would also embrace such changes in the enactments left by the reduction as would adjust their apparent meaning to precedent and judicial decision.

" The extensive plan of consolidation which we are now considering has all the advantages of the limited process which we have secondly suggested ; and, probably, it would remedy or palliate the great evil which the latter would leave undiminished.

" But though we believe that the plan in question is more complete than either of the others, we are aware that it is open to objections demanding serious consideration. Of these, the following, it appears to us, are the most important :—1. That such a consolidation is scarcely requisite for the purpose of correcting the uncertainties imputable to the statutes themselves ; since most of these uncertainties have been obviated by judicial interpretation. 2. That the doubts which now embarrass the application of the statutes, with the bulk of the authorities for their legal import, would be increased rather than diminished by the extensive process in question ; for the new text given to the remaining enactments would engender new questions productive of new solutions ; whilst their present text, with the precedents and decisions by which it has been settled, would still be frequently resorted to for the purpose of determining their effect. 3. That the systematic and compendious order which the consolidation might give for a time to the enactments left by the reduction would soon be disturbed ; inasmuch as the statutes passed subsequently to the process would speedily load the Digest with a heap of undigested provisions. 4. That the consoli-

dation could hardly be accomplished without danger to existing interests; since portions of the Statute Law relating to rights of property, or rights of other descriptions, would probably be altered by the process in their substance as well as their form."

These objections are stated with a view to an immediate refutation; but so incomplete and unsatisfactory does that refutation appear to us, that we are involuntary reminded of a well-known anecdote of Sheridan, who once drew up a formal recapitulation of sundry floating charges against himself for the newspapers, in order to create an apt occasion for an answer which he postponed and eventually omitted to supply.

The answer of the Commissioners to the objections, above enumerated, stands thus:

"It may be said to the first objection, that it greatly exaggerates the extent to which the uncertainties of the Statute Law are cured by judicial interpretation. Many of the doubts obviously apparent on its text have not been even touched by precedent and construction; so that the remedy would be partial and imperfect, although it were thoroughly effectual in the cases to which it has been applied. But, in truth, it is not thoroughly effectual even to that extent. In some instances a judicial construction of a statute has not settled the doubts which the Court endeavoured to resolve. In other instances, a construction of a statute has itself created difficulties. There are, for example, decisions which extend the effect of a statute beyond the reach of its terms, or even give it an effect inconsistent with their obvious meaning. As such extensions and departures are not governed by precise rules of interpretation, the value to be given in future to a constructive decision of the kind is frequently left indeterminate. It often is impossible to predict, whether the courts of justice, in future adjudications, will prefer the judicial construction or the express import of the statute; and, assuming that the construction will probably prevail, whether they will limit it to cases specifically similar to the case adjudged, or will extend it to cases allied to the adjudged case by a more remote resemblance. It were useless to dwell upon the decisive answer which the first objection admits of;

for the defects and mischiefs which we have ascribed to the decisions on the statutes have often been stated and regretted by the ablest and most learned lawyers. We may, however, remark, before we proceed to the second objection, that, since the Statute Law is extremely deficient in system and coherency, it is scarcely susceptible of interpretation by perfectly consistent rules. The evil of strained constructions has therefore arisen partly from imperfections in the law itself; although it can hardly be denied, that the rules or maxims by which it has been construed have even less of consistency than its imperfect structure would allow.

“ The answer which may be given to the second objection is not so decisive as that which the first admits of; since it cannot be disputed reasonably, that the new text given to the remaining enactments, might engender new questions. But it may be urged, on the other hand, that the doubts which would spring from the written law as modified by the consolidation in question, would be fewer than those which arise from it in its present defective state; and that the degree of additional certainty which it would derive from the plan is sufficient to warrant an attempt to carry that plan into effect.

“ The following is one of the reasons which might be assigned for this position:—Many of the uncertainties obviously presented by the statutes, and by the constructions which the statutes have received, have neither been corrected by the legislature nor by the Courts of justice; and if the consolidation were executed with ordinary care and skill, most of these manifest though uncorrected uncertainties, would probably be obviated by the framers of the Digest. In the process of collecting naturally allied provisions, of comparing their mutual relations, and, where they have been construed, of collating them with the corresponding constructions, it is likely that the framers of the Digest would detect a multitude of inconsistencies which have yet eluded observation; and it is but reasonable to expect that they would succeed in clearing the law from most of these latent difficulties.

“ To this it might be added, that in consequence of the general coherency which the consolidation would probably impart to the law, greater consistency might be given to the

rules of interpretation; so that if a statement of those rules were coupled with that consolidation, it is likely that the judicial constructions put upon the new text would be more systematic and less productive of uncertainty than those which the present has received.

“ It might also be said, that great advantages have arisen from those partial consolidations of the statutes which have been already accomplished; and that similar or even greater advantages would probably be produced by a general consolidation; which being executed under the superintendence of the same persons, would probably possess a degree of consistency scarcely to be expected from a number of unconnected efforts. And here we may remark, that it has been deemed expedient by Your Majesty, that the whole of the Criminal Law, written and unwritten, shall be consolidated agreeably to the method in question; and we believe, from the experience which we have had in the performance of the task, that this consolidation will prove advantageous.

“ It is assumed by the objection which we are now considering, that the plan of consolidation in question, would multiply the uncertainties of the law, and would increase the bulk of the authorities for its legal import. Having considered the former assumption, we proceed to examine the latter.

“ It is quite indisputable that the Digest would be encumbered with the new constructions which the uncertainties of the new text would naturally produce; though the evil, perhaps, might be kept within narrow limits, by the simple and obvious expedient to which we shall presently advert. With respect to the constructions on the present text, they would not, it is probable, be commonly resorted to. Since, then, incorporation with the text would extinguish their authority, they would not be binding on the Courts. And if a statement of the rules of interpretation were added to the consolidation of the law, they would not, we believe, be commonly consulted as sources of analogical argument; for the amended and consistent rules for the interpretation of the new text would probably be found the readiest guide to its import in the great majority of doubtful and disputed cases.

“ It may be remarked, in answer to the third objection,

that the enactments contained in the statutes passed subsequently to the consolidation might be referred, from time to time, to their appropriate places in the Digest. And a similar remark will apply to the constructions which the Digest would probably require; since such of its enactments as should be construed might be adjusted to the constructions by periodical revisions of its text.

"Before we dismiss this objection, we will shortly advert to a consideration which it naturally suggests. It cannot, we think, be doubted that such a consolidation of the statutes as we are now considering would facilitate future legislation, and even tend to improve it. For the existing Statute Law, concerning any given subject, could be found and ascertained by the legislature with comparative ease and precision. It is therefore highly probable that superfluous legislation would be prevented; and that such new provisions as the legislature might introduce would rarely be inconsistent with any of its previous enactments.

"It is sufficient to remark, with regard to the fourth objection, that, if due caution were used in the execution of the work, no alterations would be made which could affect existing interests."

It is to be observed, that the first of these objections is one on which very little stress would be laid by real bonâ fide objectors to the plan. To this, therefore, the Commissioners most sedulously apply themselves. The last, on the contrary, is commonly esteemed a very weighty objection; and it is summarily disposed of with the rather flippant assumption, that if due caution were used in the execution of the work, no alterations would be made which could affect existing interests; as if the precise effect, direct and indirect, of an alteration could be in every instance unherringly anticipated. With reference to this objection it also remains to be mentioned, that the Commissioners take no notice in any part of their Report of the manner in which the Statute Law is incorporated with the Common Law.

We are content to waive the third objection, that the systematic order would be speedily disturbed; though we fear there is little chance, during the present rage for law making, of limiting the number or correcting the style of enactments;

but that (in the words of the second objection) the bulk of authorities would increase with the proposed change, we entertain not the shadow of a doubt; for such has been invariably the case whenever a new system has been introduced; and the productions of these gentlemen in their corporate capacity, are by no means of a character to induce a belief that they will be enabled to disentangle themselves from embarrassments which have been found insuperable by all former labourers in this field. They proceed throughout upon the assumption that they are sure of succeeding where every one has failed.

It was expressly provided in the act authorizing the before-mentioned revision of the statute law of New York, "that no change should be made in the phraseology or distribution of the sections of any statute that had been the subject of judicial decision, by which the construction of the statute, as established by such decision, should be affected or impaired."

The Report finishes with another summary, and an enumeration of the subjects on which the Commissioners are employed :

"We have stated the principles which should, we think, govern the consolidation of the statutes according to the above respective processes. But it is proper, in considering the advantages of the first-mentioned process, to observe, that it is capable of considerable improvement, without endangering the safety which characterizes it, by an occasional adoption of the second, as by a combination of an original with an amended statute, and even of the third process in cases where the advantage of following it is obvious, and the operation simple and unlikely to give rise to any reasonable doubts; as, for example, where the decisions upon a statute are few in number, are unambiguous in their result, and effect a manifest alteration in the more obvious construction of a statute.

"We humbly submit as the general result of our consideration,—

"That a revision and alteration of the Statute Law, founded on the principle of mere reduction and expurgation, would be advantageous and perfectly safe:

“ That the process would be still more advantageous, if such an arrangement were added as rendered the Statute Law more accessible, without diminishing the aid derived from order of time, and context of enactments, and such discretionary alterations were also made in consolidating and generalizing enactments, removing obvious ambiguities, and supplying obvious omissions, as could be effected without incurring the risk of misconception and uncertainty :

“ That such alterations, although safe, advantageous and necessary, would not afford a complete remedy for existing evils :

“ That no plan of reformation short of remodelling the Statute Law on the third principle above proposed would be co-extensive with those evils ; that whilst such a reform would be highly desirable, and is, in our judgment, practicable, its execution would be difficult, would require the greatest caution, and occupy a considerable portion of time.

“ In conclusion, we have to assure Your Majesty that we have made considerable progress in digesting the Criminal Law, in obedience to Your Majesty's command, and in conformity with a letter from one of Your Majesty's principal Secretaries of State, by which we were directed to proceed in forming a Digest of the Criminal Law, as well unwritten as written, into one statute, with such partial alterations as might be considered by us to be necessary or expedient for more simply and completely defining crimes and punishments, and for the more effectual administration of Criminal Justice.

“ That we are preparing a Report, the completion of which we have deemed it proper to postpone to our Report on the Statute Law, in order that time might not be lost in proceeding to amend that important branch of the law, should any alteration be deemed necessary.

“ That in our next Report on the Criminal Law we propose to draw Your Majesty's attention to some subjects connected with the administration of Criminal Justice, in which alterations may probably be deemed expedient : more particularly to the limiting the number of capital offences,

and confining them to defined cases in which execution ought always (subject to the exercise of the Royal Prerogative) to take place on conviction; the establishment of a general scale of inferior punishments; the removal of some of the anomalies incident to the present classification of offences, particularly such as relate to the distinctions between principals and accessories, the disallowing copies of indictments, forfeitures and deodands; the necessity for distinguishing the respective jurisdictions of the superior and inferior Criminal Courts; the removal of criminal proceedings from the latter to the former by certiorari and otherwise; and the providing better means for the correction of errors and mistakes in the inferior Courts."

We were not aware till now, that the government had taken so decisive a step towards the adoption of the views presented by the former singularly inconclusive and unsatisfactory Report.

The Appendix consists of, 1. A List of all Acts repealed or in force, from 1 Edw. III. to 12 Anne: 2. An extract from Daines Barrington's work on the Ancient Statutes: 3. The Report of the Commissioners appointed to collate and revise the Public Statutes of the State of New York: 4. Extracts from Mr. Miller's Inquiry: 5. Observations on the present condition of the Poor Laws.

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#### ART. II.—LIFE OF SIR MATTHEW HALE.

*Memoirs of the Life, Character and Writings of Sir Matthew Hale, Knight, Lord Chief Justice of England.* By J. B. Williams, Esq. LL.D. F.S.A. London. 1835.

THE Life of Sir Matthew Hale is so generally known through the Memoir of Bishop Burnet—one of the most attractive among English biographies—that it is no easy matter to handle the same subject in a more modern fashion, without divesting it of some part of its merited popularity. We are therefore inclined to think that Dr. Williams has acted wisely in taking that Memoir for the nucleus of his own more ex-



tended performance, and adding to it from various sources of information such matter as might give it additional interest, especially with members of the profession to which his hero belonged. But his own words will best convey an idea of the object and contents of his book :

“ Upon the life, by Burnet, the Memoir before us, as to its basis, rests ; but the arrangement is entirely new : and the whole increased from the ‘ Notes ’ of Baxter and Stephens ; the judge’s own manuscripts : and every other accessible source. The facts have been thoroughly examined ; and, as much as possible, attended to chronologically. In addition to this, the labours of others, in the same department, have been freely used. When any thing not noticed by Burnet is introduced, the authority is quoted : but the bishop’s work is seldom formally referred to : every circumstance in it, connected with the judge, being avowedly retained. It is not improbable that some persons may, for a moment, feel surprised, if not offended, that the *style* of that standard book should have been abandoned : and the feeling is entitled to sympathy. At the same time it must be observed, that it appeared impossible to give it entire, and use, as it seemed desirable to use them, the materials which will be found in the present volume. For, had the bishop’s narrative been reprinted, the new matter must have been exhibited separately, which would have seriously affected the arrangement ; and occasioned, too, in addition to other awkwardnesses, intolerable repetitions. Besides, which (to make no allusions, by way of shelter, to the criticisms of Pope or Swift upon Burnet, as a writer) . . . . it may be anticipated that the offence, if it be such, will appear the more venial, when it is recollected, that the admirers of the beautiful Memoir alluded to have the easiest possible means of gratification : numerous copies are to be obtained, particularly the one recently edited by Bishop Jebb ; and as that edition contains the other ‘ Lives ’ Burnet wrote, and wrote so well, the expectation is justified, that the supply will continue to be unfailling.”

We feel, too, that some apology is due from ourselves for recapitulating facts so generally known as those which any outline of the life of Sir Matthew Hale can present. Our pages have contained sketches, which have proved, we hope, not wholly uninteresting, of the biographies of many eminent individuals in our profession. But the greater part of them, though well known by name, were little known by character, to the general reader, even in that profession itself. It is the

fate of lawyers, for the most part, “*virûm volitare per ora*” during the brief duration of the splendid part of their life, more, perhaps, than any other class of men. The newspapers, the debates, the daily gossip of the streets, are full of their names. Their peculiar talents, their achievements, their public conduct, form the theme of innumerable conversations. The most successful general, in his highest flush of glory, is hardly so much the theme of general discourse, as the successful advocate. But few care to pursue the story of their lives farther than the surface. Their origin, their toils and disappointments, their generally inglorious domestic affairs, furnish little attractive matter for the fancy to dwell on: and, on the whole, we believe that the biography of few men of note is so little generally known, as that of our ablest legal characters. Sir Matthew Hale forms a splendid exception to this rule: because the singular uprightness and piety of his life, which excited the admiration of his cotemporaries no less than of posterity, have rendered interesting to the most ordinary peruser the quaint and sententious record of his thoughts and actions, which have been transmitted to us by himself and by his friendly historian. The times, also, in which he lived, were favourable to the development of those excellencies, by affording even an unusual scope for the display of talent and the exercise of integrity. In discussing the character of Hale, we may indeed omit the invidious deduction so commonly made in estimating the rank of eminent men: we are not obliged to say, that his virtues and conduct were distinguished, considering the age in which he lived. In any age or country, such a life would have been no common event, most uncommon in his own. The era of the civil wars was, indeed, favourable to the development of robust virtues: much of generosity and of resolution, much patient endurance and firm religious submission were drawn forth amid the contests and sacrifices of those days. But these qualities were so rarely united with modesty and humility, and with a charitable spirit of allowance towards the defects of others—the firm adherent of one party could so rarely find room in his heart for the smallest atom of philanthropic feeling towards his opponents—that we scarcely know which circumstance is the most surprising: that a disposition and principles like those of Hale

should have been nurtured amid the storms of such a season, or that, being such as he was, he should have been sought after by all parties for such high elevation, and attended there by such universal good opinions.

Sir Matthew Hale was the only son of Robert Hale, Esq. of Alderley, in the county of Gloucester, where he was born on the 1st of November, 1609. His father had been bred to the bar; but, it is said, "early in life was embarrassed by scruples respecting the phraseology used in pleading." Time, however, appears to have reconciled him to the sin of enumerating imaginary enormous wrongs, and setting up supposititious debts to the king's exchequer, since he gave directions by will that his son should follow the law. Matthew Hale lost both his parents before attaining his fifth year; and came under the charge of a maternal relation, Antony Kingscot, of Kingscot, Esq. in Gloucestershire. The family of Kingscot (which, by the way, is one of the oldest in England, and still flourishes where it has been settled for a long series of centuries on lands of the same name) was then attached to puritanical principles: and the young lawyer's schoolmaster and college tutor were both inclined to that way of thinking, as we might judge, were there no other evidence of the fact, by the unqualified abuse which Mr. Anthony Wood has lavished on their memories. From the latter of these gentlemen, Mr. Sedgwick, Hale derived not only some tincture of puritanism, but a strong fancy for military pursuits. Sedgwick having been chaplain to the renowned Lord Vere of Tilbury, was engaged to follow his patron into the Low Countries, and Hale, at one time, was on the point of pursuing his fortunes. He then regarded the members of the legal body as "a barbarous race, and as unfit for any thing beyond their own profession;" and felt, no doubt, something of the inspiration which dictated the bold captain Alexander Radcliff's strains.

" Go tolt your cases at the fire,  
From Plowden, Perkins, Rastall, Dyer,  
Such heavy stuff does rather tire  
Than please us.

Tell not us of issue male,  
Of simple fee, and special tail,  
Of feoffments, judgments, bills of sale  
And leases.

Can you discourse of hand grenadoes,  
Of sally-ports and ambuscadoes,  
Of counterscarps and palizadoes,  
And trenches?

Of bastions, blowing up of mines,  
Or of communication lines,  
Or can you guess the great designs  
The French has?"

But he was won back to the line of life for which his father had destined him, by an event which seldom imbues the sufferer with an extra love of law—the being engaged in a suit of his own. His counsel, Serjeant Glanville, appears to have directed his attention towards those studies which he was destined so greatly to adorn, and to have thus decided his eventual career. Hale was admitted a student of Lincoln's Inn on the 8th of November, 1629. His application was eager and incessant: at one time, he says, he studied sixteen hours a day; an excess of industry which he afterwards regretted and dissuaded others from committing. Some such discipline, however, seems always to have been undergone by those who have become, like himself, eminent record lawyers. Ney, Selden and Vaughan, in his own profession, and Archbishop Usher among divines, were his early friends and patrons. How soon he began to reap the fruit of his diligence we are not informed. Burnet says, he was one of the counsel assigned to Lord Strafford (in 1640). But there is no evidence of the fact in the accounts which we possess of the trial; nor do we quite see on what grounds Dr. Williams would have his readers rely on the bishop's random assertion.<sup>1</sup> It is certain, however, that by this time he had attained a considerable rank in professional estimation, so much as to have made his conduct, in the trying times which followed, matter of note and remark. His enemies have exercised on it that perverse ingenuity which labours to discover a fault, for the sake of pulling down, if possible, an exalted character

<sup>1</sup> The reader is referred to the trial of Love (St. T. vol. ii. p. 160,) for some allusions which are said to indicate this fact. But it will only be seen there that the court reminded Mr. Hale of certain particularities in the trials of Strafford and Laud, "which he very well knew," and although Hale was certainly engaged in the latter, it is scarcely to be inferred from this hint that he was also employed in the former.

to the ordinary level: while his admirers, we cannot but think, have displayed in his defence a zeal somewhat disproportionate to the nugatory character of the accusations.

The sum of Sir Matthew Hale's conduct during the civil war and under the commonwealth is briefly this: that he is supposed to have taken the covenant in 1643; that, at all events, he continued to practise in London under the sway of the Long Parliament; that he was employed as counsel, and in other public capacities, in some important transactions on both sides; and that after the king's execution he also took the "engagement" which the new government had substituted for the oaths of allegiance and supremacy, and which bound the taker to be "true and faithful to the Commonwealth of England, without a King, or House of Lords." Those who look upon Sir Matthew Hale as a professed loyalist, zealous for the church and monarchy, may have found some difficulty in framing arguments to defend him for these various compromises of principle; while those who see no virtue but in unbending adherence to a party, have naturally condemned and exaggerated them. For ourselves, we cannot but think that the tenor of his behaviour was not only defensible, but, upon the principles he had adopted, strictly right. We do not impeach for a moment the high virtue of many of those who embraced either side with unqualified ardour, and maintained, it to the exclusion of all other considerations, in good or ill success. But there will always be a sufficiency of such zealots, whenever the public mind is excited to the true party temperature which renders it fit for all exertion and suffering in a favourite cause. But how greatly would the evils of such times be increased, were there not always some men of honour and principle, who do not feel it a disgrace to keep aloof from all fierce extremes, and to seek to alleviate and calm the excesses of each party when in its turn victorious. It was Hale's deliberate rule, to acquiesce in the government *de facto*, without servile approbation of its measures, if obnoxious to his sense of right. His notion of the duty of a citizen was the very reverse of that of the non-jurors of every revolution. He proposed the Roman citizen, Atticus, to himself as a model in political conduct; and, of course, he was willing to incur the reproach to which that personage was subject from all classes

of partisans in ancient Rome, who treated him as a trimmer and waiter on Providence. By adhering to such resolutions, Hale passed through all the changes of those eventful twenty years in which the period of his middle manhood was spent, without ever quitting his sphere of useful activity, and yet without being betrayed into one act of compliance dishonourable to a private citizen; while many of those who, in later times, have designated him as a time-server, would, in all probability, have disgraced themselves, had they then lived, by the most direct and slavish acts of apostasy. But the wisdom and maxims of Hale are so singularly applicable to the present, and to all other times of political excitement, that we cannot refrain from citing some of his remarks on men and things at the era of the Restoration, although the extract be somewhat long. He had seen the mischiefs of all parties, and the preposterous judgments which they formed of each other. He had seen Conservatives denounce all classes of Reformers alike in the vehemence of their despite, and refuse the helping hand when extended to them, because it had once been joined in fellowship with that of their enemies; he had seen Reformers, frightened at the march of ultra-reform, turn round upon their former associates, and abuse them with such hearty and vigorous malediction as none but quondam friends are wont to employ towards each other. He had seen these, and all the other extravaganzas of party perversity, and no wonder if the mildness and equity of his judgments was a little mingled, in this instance, with a tone of quiet sarcasm.

“I have observed that many of these men that have been most obnoxious upon the change of times, have been most forward, and foremost, and busy, in the precipitating of it; and most impatient of any delay in it; most ambitious in discovering their desires of it. I have seen some that have been as great occasions of advancing our distractions as any have been under Heaven, or at least never contributed to it till they saw it could not be hindered, yet the most importunate, violent, and hasty in the change when it needs them not: like the men of Israel that first entertained a defection from the house of David, upon the return of things, outrunning the fidelity of the men of Judah, that never forsook him entirely. But this violent conversion hath most ordinary one of these two interpretations upon which it withereth: either it is construed as a design to mischief, and endanger that return of things; . . . . or it is con-

strued an act constrained by necessity, or of adulation and flattery, or of self-seeking and interest, or of a pitiful and low-flying policy, to cover or obliterate the memory of former demerits, and to scrape a share of interest in the present returns; which, though it be made use of for the present advantage, yet it proves ineffectual for the end designed; and, commonly, such persons lose their interest and reputation on both sides; and, when turns are served, the memory of their former disservices returns with more acrimony; or, at least, they are laid aside as men that deserve no trust or confidence, by reason of their mutability and unfixedness, and the party which once they were of is sufficiently gratified and pleased with it, and so they become the objects of scorn and neglect to all parties.

"I have seen men who have been *in some degree* obnoxious upon the change of times, who, because they have not been *so* obnoxious as others, fall foul and fiercely upon that party that has been somewhat more obnoxious than themselves; not considering, that thereby they give a kind of just occasion to others that are less obnoxious than they, to use the same measure of severity towards them, in a little while; which either doth, or will most certainly happen; and so that rod, whereby they have whipped others, is most effectually and indispensably delivered over from them that used it unto others, for their own correction, which they intended not, till all that have had any concurrence or concomitancy in the change, have partaken in the same measure; at least, till it stop in the moderation of some persons; for it is most certain and infallible, that unless there be a stop, by moderation, in some middle parties, the animadversion against offenders, or such as are so reputed, never ceaseth till it come to the most sublimated, or, as they call it, refined<sup>1</sup> interest. This was the walk that things had in the late desolations, both in ecclesiastical and civil matters. First, the animadversion began by the presbyterian interest, upon the absolute royalist and episcopal man; the independent interest, that ran along in that severity, and thought the presbyterian not sufficiently contrary to the royal interest, is as severe upon the presbyterian; the anabaptists, and other highflyers, think that went not high enough, but had a secret inclination to monarchy, and, though in another line, fly upon the independent; and when things were at the most refined and sublimed temper, they begin to return again, much by the same steps they went; and every man, though subject to something that another may easily make a guilt, falls sharply upon another, which, it may be, hath exceeded, not considering that his turn may be the next. Thus, he that hath sworn fealty to the late Protector falls sharply upon him

<sup>1</sup> The "royalistes quand même" of the French restoration.

that abjured : he that took the engagement, falls as sharply upon both the former ; he that took the covenant only, is ready to fall upon the three former ; and he that never took any, is ready to inveigh as bitterly against the covenanter ; he that acted regularly under the Protector or Commonwealth, falls generally upon the high-court-of-justice-men ; he that acted under the Long Parliament with the same severity inveighs against both the former ; and, perchance, invites thereby the spirits of those men that acted purely on the royal account, to fall as sharply upon all three ; men looking still, generally, upon that whereof they are innocent, and not considering themselves in that whereof they are guilty, are so thought by others."

We must add the following noble consolation, especially applicable to those whose consciences afflict them on account of the ill result of public designs, to which they have contributed with the best and purest intentions.

"Doth thy conscience bear thee witness, that even in the worst of times thy *actions* have been *good*, and for the service of the unquestionable interest of the nation ? Be not so vain as to seek thine own applause, lest thou be disappointed ; but yet scorn to disown them, notwithstanding they be prejudicated, or misinterpreted. Content thyself with the serenity of thine own conscience, and the testimony it gives to thine integrity ; and value not the descants of men. Good actions, happening in a time when there were many evil, may, in the tumult and hurry of a change, undergo the same, or very little better, interpretation than the worst actions. The indignation against the latter, or the times wherein they were acted, may cover the best actions and intentions with prejudice, and censure. But when things and persons grow a little calmer, they may be restored to their due estimate. Wait therefore, with patience, upon the great searcher and judge of hearts, who, in his due time, will "bring forth thy righteousness as the noon-day ;" and, in the meantime, content thyself with the inward serenity of thy own conscience, in the midst of the mistakes and prejudices of others."

At the same time it must be admitted, that although Hale was in principle a royalist, and had a strong professional leaning to the established practice of the constitution, he probably had no vehement feelings of loyalty to suppress, when he acquiesced in the sway of the revolutionary party. His early education partook, as we have seen, of a puritanical cast. Although a supporter of episcopacy, he never seems to have been enthusiastic in its cause. Even in the high-flying



times of the Restoration, he never assented to the fashionable doctrine that any form of church or secular government was of divine ordination; although his friend Baxter candidly admits—"I must say that he was of opinion that the wealth and honour of the bishops was convenient, to enable them the better to relieve the poor, and rescue the inferior clergy from oppression, and to keep up the honour of religion in the world." In truth, pious and excellent as he was, his piety was rather of a domestic than a congregational cast. He seems always to have been rather anxious to exclude than to dwell upon the consideration of sectarian differences, at least between Protestants. And we may well suppose that before the overthrow of church and state by the fanatical party, his eyes were less open to the levelling nature of their tenets than after experience had taught him the close connexion between the two. Hence it is no disparagement to his uprightness that he took no decided part in favour of royalty in the beginning of the troubles; although it has been constantly thrown in his teeth by Tory writers, who, on other occasions, are accustomed to appeal to his authority against the sweeping innovations of later times.

With respect to the important political causes in which Hale is said to have been engaged during that turbulent era, it is singular how much uncertainty rests on this part of his biography. We have seen that there is no direct evidence of his having been counsel for Lord Strafford. He certainly was assigned to defend Archbishop Laud, and the argument in the State Trials was thought by Lord Chancellor Finch to have been his, and not that of his leader, Mr. Hern—a gentleman whose forte appears rather to have lain in *nisi prius* repartee than in solemn argument. Hale was retained, as we have said, for the Parliament, in the negotiations for the surrender of Oxford; and again for the University of Oxford, against the Parliament, on the question of the Visitation. He was also, according to Burnet, assigned counsel to Charles I. on his trial; and the report had passed unquestioned until the recent editor of his works, Mr. Thirlwall, raised a doubt respecting its authenticity. It is certainly singular enough that there should be no more authentic record of so important an event in his life. Although it is true that,

in consequence of the king's refusal to acknowledge the jurisdiction of the Court, no counsel could be heard in his behalf; yet it seems strange that, in the great minuteness of detail with which all the circumstance and show of that great tragedy have been transmitted to us, the name of a person selected to play so important a part should have been wholly forgotten, and that the fact should only be known through a memoir written thirty years afterwards. Mr. Serjeant Runtington however, in the life prefixed to his edition of Hale's *History of the Common Law*, not only admits the truth of the story, but conjectures it was Hale who furnished his illustrious client with the line of defence which he actually adopted, namely, to deny the jurisdiction of the Court. There is some plausibility in the supposition. Certainly a course more dignified, and at the same time more ingenious, could not have been suggested; for it must be borne in mind that as Charles came to the bar knowing his death predetermined, the object of his defence was, not to save his life, but to set himself right in the eyes of the existing generation and of posterity: by debating questions of fact, he would have given too clear an advantage to his opponents. But it seems so bold and uncompromising a line as no lawyer, with a mind less capacious and free from professional obliquities than that of Hale's, would have ventured to mark out for him. All these facts prove the high reputation of Hale, not only in his calling, but in his private character. But inasmuch as he appears on the most important of these occasions to have acted under the appointment of the judge, i. e. in those times, of the prosecuting party, rather than under the free choice of the defendant, they surely do not show that he was looked upon by the royalist party as an adherent to their own persuasion, or as a sturdy opponent of the then existing government. But the death of Charles, and the abrogation of monarchy, undoubtedly weighed heavily on his mind. He is said to have concealed his unfinished manuscripts of the "*Pleas of the Crown*" behind the wainscoting of his study, with the remark, that "there would be no more occasion for them until the King was restored to his right." He afterwards appeared as counsel for the Duke of Hamilton, Lord Holland, Lords Capel and Craven; and in the last of these

cases he drew down on himself the threats of the attorney-general for the Commonwealth, which he met with becoming resolution. But of all his defences, that of Christopher Love, a young Presbyterian minister, arraigned of high treason by Cromwell's council, in 1651, was the most remarkable; and although his client on that occasion, like all his former distinguished clients, had the misfortune to be executed, he suffered with all the satisfaction of having had his case admirably argued on the question of law.

On the 16th December, 1653, Cromwell was installed Protector. Hale was the only new judge made on his accession to this dignity. But there is some obscurity about the precise time of his elevation to the bench of the Common Pleas, and also of his taking the preceding degree of Serjeant, which must have been after the death of Charles I.; for Siderfin mentions him among the fourteen serjeants to whom fresh patents were granted at the Restoration, their first creation being presumed invalid. They appeared and were sworn on the 22d June, 1660. "*Et le prochain jour,*" adds the reporter, with perceptible exultation, "*ils veint en leur vieux serjeants robes et Count en le Common Banke en François.*" The twelve years' dream of new institutions had passed away, and the old gowns and Norman French came back in the train of *Astræa Redux*. According to a well-known anecdote, Hale was for some time reluctant to accept the Protector's commission, and plainly told him that he was not satisfied of his authority: to which Cromwell is said to have replied, "If you will not let me govern by red gowns, I will do it by red coats." Mr. Serjeant Runnington, in recounting this story, adds a truly professional "*quære.*" "I doubt," he says, "whether the army had at this time any regular uniform, and if they had, that it was scarlet." But the learned serjeant's doubt is unfounded. Many of Cromwell's regiments certainly wore red coats; although regular uniform was not introduced into the French army until 1670, nor into the English until a somewhat later period.

Not only did Hale accept his commission with unfeigned reluctance, but, as is well known, after a short time his scruples prevented him from sitting on the crown side of his Court. We are not aware that his writings contain any ex-

planation of the nature of the doubts which beset him on this occasion. If he was convinced that the necessities of his country required men not to shrink from executing justice under an usurped authority, it is difficult to understand why he should have thought that he was not as much called upon to repress offences, as to decide civil suits. On the whole we cannot but think, with Mr. Roscoe (*"Lives of eminent British Lawyers"*), that it would have been a manlier course had he acted otherwise. We can scarcely agree with Dr. Williams in supposing that a few vexatious obstacles, which he is said to have encountered, in administering criminal justice, from military officers and other agents of Cromwell's government, could at all have influenced his decision. Such interruptions could not but have been expected, under a government just formed out of anarchy; and the Protector was far too wise and too high-minded to countenance any material interference with the ordinary course of the law. State offences stood upon a different footing; and with these, after his open avowal of dissatisfaction with the Protector's authority, he could not reasonably be expected to intermeddle.

In 1654 Hale was chosen one of the five knights of the shire for the county of Gloucester, in Cromwell's reformed parliament. This parliament only sat five months. Hale appears to have taken a part of some consequence in its debates. He opposed, with success, the project of the levellers, to destroy all the records in the Tower, as part of their scheme for settling the affairs of the nation on a new basis. In the great discussion respecting the new constitution, he took part by suggesting that the whole military power should be left, for the present, in the Protector's hands, but his legislative powers limited by instructions from Parliament, according to the suggestions of the republican party. It is difficult to see how it could have been expected that an individual, entrusted with the unlimited power of the sword, should have submitted to such restrictions as his enemies were pleased to impose on his civil authority: but probably the motion was only made as a temporary expedient, to avoid a collision of parties and the consequent dissolution of the assembly. In the next Parliament (summoned Sept. 1656) Hale did not serve; but in the following year he was summoned, as a judge, to sit in

Cromwell's new upper house. On the death of that chief, in 1658, Hale acted definitely on those principles which he had partially adopted before; he refused Richard Cromwell's commission. In the new Parliament of 1658 he represented the University of Oxford, which learned body sought likewise to secure his services in the Convention Parliament of 1660; but he preferred the offered representation of his native county. It is one of the most honourable traits of his public life that even in the first burst of loyalty, at the period of the Restoration, when the whole nation was hurrying to lay itself and its hard-won liberties at the feet of its recovered monarch, he made a struggle, although without success, to impose conditions on Charles II.; but his motion was rejected, and chiefly through the influence of Monk himself. His first public employment under the restored government was one to which the temper both of his head and heart was admirably adapted, as well as inclined. He was nominated one of the committee on the Act of Indemnity, which was framed and carried through the lower house by him. Charles was, of course, compelled to this act of grace, which was indispensable for the support of his recovered authority. But at a time when the country was possessed with a blind animosity against all parties concerned in the late events, private enmities and public prejudices threw such powerful impediments in the way even of this necessary enactment, that it required both moderation and firmness to undertake the management of its details in such an assembly as the Parliament of 1660. It was not without personal solicitation, on the part of the King, that the reluctance of the House of Lords to pass it was vanquished.

Hale was included in the special commission for the trial of the regicides. On the 7th November, 1660, he was created Chief Baron, on the recommendation of Lord Clarendon, succeeding Sir Orlando Bridgman, who was removed to the Common Pleas. There is a paper in Hargrave's Law Tracts, containing twelve reasons, drawn up by Hale himself, for his unwillingness to accept the proffered dignity. Among these is his poverty,—“my estate not being above 500*l.* per annum, six children unprovided for, and a debt of 1000*l.* lying upon me.” The situation of a judge must indeed have afforded

much temptation, in those times, to a needy man, to deviate from the path of honesty; the emoluments consisting almost entirely of fees, and large opportunities of increasing them by fraudulent practices being thrown in his way. On this account some of Sir Matthew Hale's scruples, which have been ridiculed as savouring of puritanical rigour, have always appeared to us founded in solid considerations of public advantage. He refused, for example, to try the cause of a country gentleman, who had made him the ordinary circuit present of a buck; and, on the western circuit, made his servant pay for the regular offering of six sugar loaves from the Dean and Chapter of Salisbury, when they were parties to a suit in his Court. These punctilios were undoubtedly unnecessary, had the judicial ermine been as unsullied in those days as now: but in times when it was but too notorious that the favour of tribunals might possibly be a purchaseable commodity, a little ostentation of integrity may not have been unserviceable to raise the character of justice in the estimation of the commonalty. The judicial demeanour, like the judicial robe, is not to be estimated merely by its importance in the eyes of intelligent men, or ridiculed because its value is not intrinsic, but adventitious. Both are, in a sense, disguises; but it is of some consequence that both should be worn, until the utilitarian millenium shall arrive at last.

A more dignified objection, on Hale's part, to accepting the judicial office than that of poverty, was his consciousness that his high personal and professional authority might be of still greater service to the public, if unfettered by any employment, however honourable. Some others of his twelve reasons we can scarcely imagine him to have propounded in earnest: as where he says, "I have had the perusal of most of the considerable titles and questions in law that are now on foot in England, or that are likely to grow into controversy within a short time; and it is not so fit for me, that am pre-engaged in opinion, to have these cases fall under my judgment as a judge, as I need must either upon trials or judgment." Surely he cannot have been of opinion, that men in large practice were, from that very circumstance, unfit candidates for the bench. And when he sums up his

considerations by wishing that if he is forced to accept an office, "it may be the lowest place that may be, that I may avoid envy: one of his majesty's counsel in ordinary, or, at most, the place of a puisne judge in the Common Pleas, would suit me best"—it is difficult not to suspect that the cloak of affected humility was occasionally assumed even by the most upright and excellent men of his time and order.

In 1644 occurred the famous trial of Rose Cullender and Amy Duny for witchcraft, before Sir Matthew Hale, at the Suffolk Assizes. Almost every man of public notoriety appears destined, in some one or more acts of his career, to commit such a grand mistake as shall afford a constant subject of ridicule or reproach against him, the memory of which becomes so intimately connected with his name, that it rises up, like an envious accusing spirit, whenever he is mentioned with eulogy. The fate of these victims is, in Sir Matthew Hale's life, what that of André is in the life of Washington, and that of D'Enghien in the life of Buonaparte. The chapter to which the reader turns with most exultation or with most regret, according as he is in the vein to depreciate or exalt the character of his subject. It is no small praise to say that Hale's enemies have no more serious ground of accusation than what is afforded by this melancholy error. On the other hand, he must not stand wholly excused, as his biographer seems to expect, on the common argument, that he did but act in accordance with the uniform belief of his countrymen. The hateful spirit of witch-persecution was wearing out among the people, and had already lost nearly all sympathy among educated men, when this judgment was pronounced. Although Holt was the first who ventured to direct juries to acquit in charges of witchcraft on the ground of their absurdity, yet there is every reason to suppose that long before his time they were discouraged by enlightened judges: although some might give way from weakness, others from a sense of the importance of upholding even erroneous law, and others, as Roger North sensibly observes respecting his brother the lord-keeper, from feeling that in summing up in favour of a prisoner, they frequently caused him to run a greater risk, by running counter to the obstinate prejudices of juries. But Hale reflected with perfect satisfaction on the

judgment he had pronounced, which speaks ill for his enlightenment, although well for his honesty. He made it the subject of a written meditation "concerning the mercy of God in preserving us from the malice and power of evil angels." It is going rather too far to say, with Dr. Williams, that his opinions agreed, even then, with those "of the great bulk, not to say the most eminent, learned, and pious of mankind." We should rather attribute this lamentable error in part to his peculiar religious education. For this superstition prevailed with the greatest malignity among the strictest of the sectarians: witness the witch-persecutions under Cromwell, and among the enthusiasts of New England.

The business in the Court of Exchequer increased greatly, and its decisions acquired high authority under the presidency of Hale. It was while Chief Baron that he sat at Clifford's Inn, under the commission to settle disputes between landlord and tenant, &c. after the Fire of London. In 1671 he was made Lord Chief Justice of the Court of King's Bench, on the death of Sir John Keyling. In this high office his diligence and his intrepid rectitude were even more distinguished than before, and the influence and public authority of his name more widely diffused. His judicial conduct throughout exhibited the same distinctive features. He seems to have acted constantly under the impression that his office was a part to be played not only with integrity, but with minute attention to certain peculiarities which he deemed requisite in conduct and demeanour. Thus his fear lest justice might be thought to favour the rich, sometimes led him to assume a tone and manner which occasioned the report that he was unjustly partial to the poorer suitor. He was accused of courting popularity, by exhibiting a leaning against the Crown in matters wherein it was interested. But when we remember the rampant servility of so many judges in the reign of Charles the Second, and the voluntary prostration of the manliest intellects on the Bench under court influence, a little affectation on the other side may rarely have been not without use in reconciling the people to the administration of justice. So again, there was a semblance of severity, such as himself would have called "a personated anger," in some of his denunciations from the tribunal, especially against



the malversations of persons in office, which may occasionally have appeared almost theatrical in so staid a personage. But in these, as well as the other peculiarities of his judicial demeanour, it is never to be forgotten that the extreme, towards which he appeared to lean, was the very opposite of that towards which his cotemporary judges exhibited so manifest an inclination.

In the prejudiced narrative of Roger North, who seems to have been divided between his dislike of Hale's person and politics, and his admiration of his high character, this peculiarity of the great judge has been exaggerated into an obstinate partiality towards those opposed to the Court, and a timid subjection to popular clamour. North's observations are very often sensible and judicious in themselves, even when his application of them to individual cases is most distorted by his predilections and animosities. On this occasion they are worth citing. "He put on," he says, "the show of much valour, as if the danger seemed to lie on that side from whence either the loss of his place (of which he really made no great account) or some more violent, or, as they pretended, arbitrary infliction might fall on him. Whereas, in truth, that side was safe, as he must needs know, and that all real danger to a judge was from the impetuous fury of a rabble, who have as little sense or discretion as justice; and from the House of Commons, who seldom want their wills, and, for the most part, with the power of the crown, obtain them. . . . But it is pleasant to consider that this man's not fearing the Court was accounted valour; that is, by the populace, who never accounted his fear of themselves to have been mere timidity." There is both shrewdness and truth in the general purport of these remarks, which will apply to many seekers of popularity not on the Bench only, but in other situations, in times when prerogative is low, and the democratic element flourishes. But in the age which saw Scroggs, Jefferies, and Saunders on the Bench, it will not be difficult to decide on which side the greatest danger lay; and whether Hale's leaning, if any, was not towards the safer extreme.

In the externals of public life he was perhaps a little too unostentatious; and he hated ostentation in others. He had an aversion, like some judges in our days, towards fashionable

novelties of costume, and disliked to see them in his court. "The sight of students in long periwigs, or attornies with swords, was known to be so offensive to him, as to induce those who loved such things to avoid them when they waited upon him, in order to escape reproof." One practice of his, if correctly reported, would scarcely have suited the more earnest character and larger amount of business in modern times. It appears that he used to encourage long arguments on points of law, and hold a kind of debate with counsel, "to all imaginable advantage to the students." His manner on the Bench seems to have been rather easy than dignified on ordinary occasions; and his speech habitually so low and indistinct, as to occasion some difficulty to his hearers. We must add, as the only recorded characteristic of his personal demeanor, that his favourite attitude, when delivering one of his brief judicial addresses from the Bench, was that of "putting his thumbs in his girdle."

We have already alluded to that amusing scandal-monger, Roger North's charge against him, of subserviency to popular clamour, and partiality shown towards puritans and non-conformists in the discharge of his high duties. These he has illustrated by remarks on several cases, which he appears to have taken from his brother the Lord Keeper's common place book, who seems to have indulged his party grudge against the illustrious magistrate by taking notes of all such decisions as displeased him. Many of these, however, cannot well have furnished any weighty imputation against him, inasmuch as North honestly confesses, that he cannot find out why the note was taken. Others of these comments, again, reflect upon him for those parts of his conduct which in modern estimation merit the highest eulogy; for example, the unconstitutional practice of fining jurymen for verdicts which the Court held to be against evidence, was effectually checked by Hale, when Chief Baron, staying process whenever such fines had been estreated into the Exchequer; an innovation which North denounces as against law, and subversive of order. Hale, however, expressly says, that he took this course with the concurrence of his brethren. But the two cases in respect of which North presses his accusation with the greatest zeal, are *Cutts v. Pickering*, and *Soane v. Bar-*

nardiston, and the circumstances do appear to give some colour to the suspicion, that the judge's uprightness may have been a little occasionally warped by the aversion which he had certainly conceived to the conduct of the Court and its partisans. In the first of these cases, a Puritan gentleman of the name of Pickering, the defendant, lay under the imputation of having effected an erasure in a will; and although Hale was strong in his favour, the jury by their finding seem to have believed the charge. The latter was an action arising out of the following circumstances. Lord Huntingtower and Sir Samuel Barnardiston were candidates for the representation of Essex; the former a Tory, the latter at that time a zealous Whig. Soane was the sheriff; a weak, good-natured man of small estate, according to North, and a relation of Barnardiston. At the election, a Whig mob of bludgeon-men (according to the impartial Roger) assaulted the innocent Tories, broke open the polling booths, and impeded the election. The sheriff was much perplexed to know how to proceed; at length, by the advice of some of Lord Huntingtower's friends, he resolved "the middle course to steer," and made a double return. Afterwards, Barnardiston having been seated by a Committee, brought his action on the case against the sheriff, for the damage accruing to him by the prosecution of his claim; and took care, according to North, to have it tried by a Middlesex jury, and before Sir Matthew Hale. The correctness of the form of action was much disputed; and, it being adjourned for trial, Hale made of it what the lawyers then called "a table case," that is, he consulted his brethren and the serjeants about it, at dinner in Serjeants' Inn Hall; "and, as his way was, to his questions he annexed his reasons before he took their answers; for his reasons might possibly lead them into his opinion; and then, his sentence in Court had been adorned with the adjunct of the opinions of the Serjeants' Bench; . . . but, upon the proof, divers of the other judges and serjeants were of an opinion different from his; and some doubted, and thought it a case that deserved to be better considered; and very few were clear with him. Upon this disappointment he thought fit to slight them all, and made no more words about it; else, their opinions had been quoted in Court, or at least put under a prejudice against a

writ of error should come; of which Hale had a prophetic presight." The trial came on; and, exclaims North in a fine fit of enthusiasm, "a stout trial it was: well-feed counsel, willing witnesses, and zeal of parties, failed not to make the most of the pretensions on both sides." The jury, under Hale's direction, found for the plaintiff, and moreover gave 800*l.* damages; a sum reckoned so enormous, that the judge himself who had done the mischief, according to North, looked "pensive" at hearing it announced. However, the cause was brought on error into the Exchequer chamber; and the event was regarded almost as a trial of strength between the parties. The non-conformists mustered strong to hear the judgment. "A strange sort of people came there," says North, "whose like I never saw any where else; odd, stiff figures," whose errand was partly to see if their friend was likely to get his money, and partly to observe, and, if possible, overawe the Court; for which purpose Lord Shaftesbury and Lord Wharton, and other chiefs of the Whig party, were also present. The result was that the judges, by a majority of five against three, overruled Hale's judgment. This is North's account of the matter, compiled from his *Life of the Lord Keeper and his Examen*; it is unnecessary to add, with how much deduction it is to be received on the score of party prejudice. His representations of Hale have been commented on severely, and in some respects justly, by Mr. Hargrave, in his preface to his *Collection of Tracts*, and to Hale's *Jurisdiction of the House of Lords*.

In 1676, Hale resigned his office, on account of the sudden failure of his health. It is honourable both to the country and its governors, that the latter did all in their power to induce him to retain it, and to avert what, as Dr. Williams truly says, was regarded almost as a national calamity; so great was the love and veneration in which he was held. "His voice," says no favourable witness, "was oracular, and his person little less than adored." He surrendered his place by a formal deed of resignation, drawn and written by himself: this step he took in order to obviate the doubt which then existed, whether a chief justice, being placed by writ, was removable at pleasure like other judges. His death fol-

lowed shortly afterwards, December, 25, 1676, at his seat in Gloucestershire.

Neither our limits, nor the character of our work, admit of our entering into those beautiful details of Hale's domestic life, which have rendered his memory even more cherished by the good and pious in all professions, than it is venerated on other grounds by the learned in his own. His piety, among his many virtues, was the most conspicuous and is the best remembered; but, as we have said before, he was rather one of those who have honoured the Church of England by moral and religious excellence at home, than by a zealous advocacy of her cause in her temporal struggles. No pen has given so interesting a description of his habits, with respect to religious observance, as his own: but the letter of Baxter to Mr. Stephens, written after the publication of his life by Bishop Burnet, adds much to our knowledge of his thoughts and familiar conversation on spiritual topics. Baxter became acquainted with him through neighbourhood, at Acton near London, where they both resided, in 1670. Their acquaintance soon ripened into intimacy: and the high mutual respect which they entertained for each other, was of service to both; to Baxter especially, whose hostility towards the Church was tempered by intercourse with so excellent a member of it, while Hale, by all his principles as well as the turn of his mind, was inclined towards moderation. The latter was very favourable to the project of a new act of uniformity for the purpose of reconciling the dissenters to the church; and, at one time, drew up the form of a bill to that effect, with the assistance of some divines of both sides: but the zeal of the then House of Commons prevented it from being ever proposed; and thus was stifled, perhaps, one of the most hopeful of the many schemes which have been framed for that end. Baxter, who evidently wishes to make the judge lean towards his side of the question as far as possible, dwells on some particularities in his conduct in church:<sup>1</sup> as, that "to avoid

<sup>1</sup> Hale's conscientious observance of the Sabbath is a well-known and admirable trait in his character; in which he has been imitated by but few distinguished legal personages. But Dr. Williams draws rather largely on our admiration of him in such passages as the following. "As early as the year 1651, when suddenly called upon, in the capacity of counsel for Mr. Love, he shrank not, like a

the differencing of the gospels from the epistles, and the bowing at the name of Jesus, from the names Christ, Saviour, God, &c. he would use some equality in his gestures, and stand up at the reading of all God's word alike." At all events, he protected, as far as his office would allow him, the unfortunate non-conformists, who were subjected to persecution under the sweeping enactments of Charles the Second's reign.

Why Sir Matthew Hale should have married two successive wives from Fawley, in Berkshire, his biographers have neglected to inform us; it is fair to suppose, that having found the first commodity of excellent quality, he resorted to the same place on the next occasion, but we are half inclined to suspect that there is some mistake in this part of his biography, and that the second lady has been confounded with the first, who was the daughter of Sir Henry Moore and grand-daughter of Sir Francis, serjeant-at-law. It is rather singular, considering Hale's character as a model of domestic virtues, and the author of the famous "Letters of Advice to his Grandchildren," that neither he nor any one else seem to have thought it worth while to leave any mention at all of her, except that she bore him ten children: while they have said very little about her successor. The latter, according to the judge's detractors, was a servant; this his panegyrists deny. It seems certain, however, that she was of low origin,

true-hearted follower of Christ, from avowing as the reason of his unpreparedness, that it was Saturday night late before he had notice of the engagement, and that the next day was not a day to think of these things." There can be no doubt of the sincerity of the avowal; but we do not see its boldness. The man who had ventured to avow, in 1651, that he *had* attended to his client's cause on a Sunday, would have been incomparably the bolder of the two. He would have had to put up with the loss of practice and reputation, and, perhaps, with a fine or a month's leisure in prison into the bargain. Surely, too, the reasons which Hale assigned for his strictness in this respect are not all to be cited as evidences of a rational piety: as when he told Baxter of all the "cross accidents" which befel him on a Sunday journey; how "one horse fell lame, another died, and much more; which struck him with such a sense of Divine rebuke as he never forgot;" and many similar passages, in which he asserts that temporal affairs conducted on that day never turned out well. Such notions cannot be less superstitious, when expressed by a learned and religious scholar, than when uttered by an ignorant rustic. At all events, they are not the reasons which should be ropounded to induce men to reverence the Lord's Day.

and that he married her for the sake of being tended in his old age. He speaks highly of her in his will: of his children little is known. Roger North says, that his sons all died "in the sink of lewdness and debauchery," and ascribes the catastrophe to the strictness of their education. One only survived him; but as all were married, it is hardly probable that they were men of very irregular lives.

Dr. Williams' book concludes with a catalogue of Sir Matthew Hale's numerous works, the greater part of which were left by him in MS., and, amongst these, his most valuable legal treatises. It is singular, although by no means without parallel in the lives of celebrated men, that he should have set so little store by the fruits of his study in the line of his own profession, and applied himself with much more apparent complacency to the production of essays on matters of philosophy, in which his talents are not exhibited to the best advantage. This was certainly the case, although Dr. Williams seems hardly inclined to admit it: and it is the more remarkable, because the judge was not only versed in record law far beyond any man of his time (Prynne, perhaps, excepted), but in reality fondly attached to the pursuit of that and similar abstruse antiquarian studies. One of North's charges against him is, that in the trial of a cause between the lord of the manor and the people of some township in Essex, the former having set up his title by a long deduction from "offices post mortem, charters, pedigrees, and divers matters of record," he was so transported beyond the bounds of judicial reserve, as to call it "a noble evidence;" thereby, in that writer's opinion, prejudicing the opponent's case, which had not yet been heard. To Lord Hale's other merits as a writer two must be added, which have not perhaps been made so frequently the subjects of encomium as the rest: his singular clearness of arrangement, a virtue by which few writers of that age were distinguished, and his manly, vernacular diction; which his enemy, whom we have been obliged so often to cite against him, calls "a significant English style, better than which no one would desire to meet with as a temptation to read."

We cannot avoid concluding this paper with the following characteristic letter of Lord Erskine, which, although having

no reference to his subject, Dr. Williams has printed among his notes as a curiosity. It appears to have been on the occasion of some free-and-easy jest, of which the ex-chancellor had been made the subject.

SIR,

*Upper Berkely Street, November 13, 1819.*

"Your letter was sent to me from Sussex yesterday. I certainly was appointed chancellor under the administration under which Mr. Fox was secretary of state in 1806, and could have been chancellor under no administration in which he had not had a part; nor would have accepted, without him, any office whatsoever. I believe that administration was said, by all the *blockheads*, to be made up of all the *talent* in the country.

"But you have certainly lost your bet on the subject of my decrees. *None of which*, but one, was appealed against, except one upon a branch of Mr. Thellusson's will; *but it was affirmed* without a dissentient voice, on the motion of Lord Eldon, then, and now, Lord Chancellor. If you think I was no lawyer, you may continue to think so. It is plain you are no lawyer yourself; but I wish every man to retain his opinions, though at the cost of three dozen of port.

Your humble servant,

ERSKINE."

"To save you from spending your money upon bets you are sure to lose, remember that no man can be a great advocate who is no lawyer. The thing is impossible."

M.

# ART. III.—MERCANTILE LAW, NO. XV.—MERCHANT SHIPPING.

(Continued.)

It will be remembered, that a part of the subject relating to the hiring of mariners, was passed over on account of an expected alteration in the law, then in actual progress, for which it was thought advisable to wait. The contemplated measure has since received the sanction of the legislature, and forms the 19th Chapter of the 6 W. IV. under the title of "An act to amend and consolidate the Laws relating to the Merchant Seamen of the United Kingdom, and for forming and maintaining a Register of the Men engaged in that Service." Of this excellent statute it is no exaggerated commendation to say, that it is politic in its object,<sup>1</sup> humane

<sup>1</sup> We are not sure that the public generally is aware that one very important purpose of this act, in co-operation with another passed in the same session,



and liberal in spirit, comprehensive and practical in its provisions, and, as compared with acts of parliament generally, concise, perspicuous, and, for the most part, accurate in its language.<sup>1</sup> The end proposed, as indicated in the preamble, is the procuring of "a large, constant, and ready supply of seamen, as well for carrying on the commerce, as for the defence of his Majesty's dominions;" and the declared intention is, "to aid by all practicable means the increase of the number of such seamen, and to give them all due protection and encouragement." With this act before us, we propose now to fill up the space which was left, and to treat in their order of the hiring, the service, and the remuneration of merchant seamen; premising that in the term "seaman" or "mariner," we comprehend, to adopt the definition of the act, "any person (apprentice excepted) who shall be engaged or employed to serve in any capacity on board the ship."

And first, of the hiring.—The engagement of the crew to serve on board a merchant vessel is in the first instance made verbally with the master. It seems, however, that from early times it was usual to reduce the substance of the contract into a written instrument, which was signed by each seaman, and was then, as now, known under the name of the Ship's Articles. In the year 1729, this practice was sanctioned and enforced in a statute passed for the general regulation of merchant seamen,<sup>2</sup> which, adopting the simplicity of the form then in actual use, required merely, as regarded the written agreement, that it should "declare (5 & 6 Will. IV. c. 24,) for encouraging the voluntary enlistment of seamen, is to gradually supersede, by rendering unnecessary, the harsh and scarcely defensible practice of forcible impressment. Every one will join heartily in the prayer that this humane experiment may be successful.

<sup>1</sup> If we were disposed to find fault, we should say, that there is a want of method in the order of the enactments. We are apprehensive, moreover, that some doubts will be raised, as there are others left which ought to have been removed. A competent *board of reduction*, to which all bills should be submitted before they are finally passed into laws, would tend greatly to the abatement of such an evil as this, the extent and mischief of which are not duly appreciated.

<sup>2</sup> 2 Geo. II. c. 36, (made perpetual by 2 Geo. III. c. 21.) From the preamble of this act, which is a long manifesto of grievances, arising from the misconduct of merchant seamen, it seems to have been a measure directed against them rather than introduced for their benefit and protection. Most of the clauses are for the prevention or punishment of desertion and neglect of duty.

what wages each seaman or mariner was to have respectively during the whole voyage, or for so long a time as he or they should ship themselves for; and also should express the voyage for which such seaman or mariner was shipt to perform the same;" the service on the one hand, and the remuneration on the other, being, as is manifest, the two essential parts of the contract. But the nature and duration of the service could not be indicated without a correct and circumstantial designation of the voyage, and the maritime Court therefore, under the cognizance of which these contracts generally fall, interpreting the statute beneficially for the seaman, required that it should be set forth in the articles with as much particularity as the nature of the case admitted. Strictness of description, indeed, was not always possible; for in the advance of commerce it happened not unfrequently, especially in the case of ships trading to the Indian and Pacific oceans, that on account of the inability to procure return cargoes in the ports of outward destination, and the consequent necessity of seeking freights elsewhere, neither the extent nor even the course of the voyage could be precisely determined beforehand. But the relaxation necessarily permitted in those instances soon degenerated into an abuse, little creditable to these by whom it was practised or connived at, and which at length drew forth the dignified reprehension of the humane and enlightened judge who at that time adorned the Admiralty Court.<sup>1</sup> Instances,

<sup>1</sup> The case of the *Minerva* (Bell), 1 Hag. Adm. Rep. 347, which gave occasion to this reproof, was certainly an outrageous one. The summary petition (for it was a cause of subtraction of wages), after setting forth that James Dunn was hired in the port of London at 2*l.* per month, and that he signed the ship's articles, contained a special allegation "that in the articles the words *to New South Wales and India, and to return to a port in Europe* were visibly written, and the same were seen by or known to the said J. D., and many other mariners who signed the articles," and that at the time of hiring, the master also stated the voyage to be as just described. "That upon a close inspection of the articles it now appears, that the words *or elsewhere* are obscurely written after the word *India*, but the same were not seen or known by J. D. nor by many others of the mariners at the time of signing, nor until after the arrival of the vessel at New South Wales." Under this agreement the master asserted and exercised the right to carry the crew on a series of experimental voyages from Port Jackson to New Zealand, from thence to Valparaiso, from Valparaiso to Lima; from Lima to Otaheite, and from thence back to Sydney, from Sydney to Calcutta, and so at length from Calcutta to Eng-

it is painful to acknowledge, have occurred in which seamen, a race of men proverbially simple and incautious, have been entrapped into contracts for service never contemplated by themselves, and have only discovered the fraud which had

land. The petitioner, with twelve others, after repeated but vain remonstrances against the deception which had been practised upon them, finally quitted the ship at Calcutta, and after an imprisonment of 25 days at that place for this desertion, engaged on board another vessel bound for England at a rate of wages nearly double of that stipulated in their former articles. The suit was brought for wages due in respect of the long service performed under the articles; and from the admirable judgment of Lord Stowell, pronouncing in favour of the claim, we are tempted to extract the following passages, "The primary and particular objection taken in this case is, 1st. to the correctness of the description of the voyage, which objection, if founded, exposes a fatal defect in the body of the instrument. It is described there as a voyage from London to New South Wales and India, and to return to a port in Europe. In the margin there is added, in a way hardly legible, and without any reference as to where these words are to come in, 'or elsewhere.' Now, upon the balance of evidence I strongly incline to hold that these words did not compose any part of the text of the original contract; but if they did, I have no hesitation in asserting, that they are not to be taken in that indefinite latitude in which they are expressed: they are no description of a voyage; they are an unlimited description of the navigable globe." His Lordship then proceeds to make some valuable observations on the reasonable limits which must be assigned to this generality of expression, and after commenting with just severity on the arbitrary conduct of the master, concludes as follows: "I think I cannot dismiss this subject without some notice taken of two of the witnesses out of three produced by the captain. They are members of two considerable houses of trade in this city; they know nothing of the particular facts of this case, but they both admit their own and the general use of a very loose and indeterminate description in the instructions given to their captains on such voyages. I mean no disrespect to these gentlemen, who, I understand, are respectable persons, when I add, referring them to the observations I have already made, that this practice appears to require some revision; they will recollect that these men have a country and a home, and possibly wives and families; and that the banishment of such men to remote regions of the globe for an indeterminate course of time and occupation, against their consent and in defiance of a solemn contract guaranteed by an act of the legislature, is a practice which, however approved by those who profit by it, most other men will be apt to think is much more easy to be described than to be defended." In a case which followed soon after this (*The George Home*, 1 Hag. 370,) the same learned judge, with reference to the same subject of a too general description of the voyage, says, "The beneficial purposes for which the law makes such a requisition in favour of the seaman are, that he may know, as exactly as can be described, for what probable space of time he surrenders himself, his services, his interest, his domestic comforts, his health and personal convenience. These and other considerations are to influence his decision. With respect to the disposal of himself, he has a right to be informed, so far as competent accuracy can be applied to the subject, and it is unnecessary to add that a description which extends over one entire quarter of the globe, without any particular limitation, though geographically true, affords nothing that can be considered as bearing the shape or colour of such accuracy."

been practised upon them, when it was too late to release themselves from the consequences. To prevent, therefore, as far as legislative care can prevent, the possible recurrence of such scandals, the present statute, with a precise and stringent particularity, enacts, that it shall not be lawful for the master of any ship belonging to a British subject, trading to parts beyond the seas, or of any British registered ship of the burden of 80 tons and upwards, employed in the fisheries of the United Kingdom, or in the coasting trade, [comprehending, as afterwards appears, under this latter term, the trade to the adjacent British islands, and to the continental coast from the *Elbe* inclusive to *Brest*,] to carry to sea on any voyage either from this kingdom or from any other place any seaman or other person as one of his crew or complement (apprentices excepted) without first entering into an agreement in writing<sup>1</sup> with every such seaman, specifying what monthly or other wages every such seaman is to be paid, the capacity in which he is to act, and the nature of the voyage in which the ship is to be employed, "so that the seaman may have some means of judging of the probable period for which he is to be engaged." The agreement moreover is to bear the true date of the making, and is to be signed first by the master and then by the seamen at the ports where they shall be respectively shipped; and further, before any seaman shall be required to sign, the master is to cause the agreement to be distinctly read over to him by or in the presence of the party who is to attest the signature, "in order that he may be enabled to understand the purport and meaning of the engagement he enters into, and the terms to which he is bound."<sup>2</sup>

<sup>1</sup> The agreement need not be stamped, s. 35, repealing 4 & 5 Will. IV. c. 89, s. 11, which imposed a stamp duty of 2s.

<sup>2</sup> An injunction by no means unnecessary, if we are to judge from the following remarks of Lord Stowell in the case last-mentioned. "I cannot conclude without remarking rather as matter of general observation, than of any particular censure upon the case, that there appears to be a laxity and inaccuracy both about the structure and execution of the mariner's contract which requires to be corrected. The present suitor, who can neither read nor write, never had the contract read over to him. It is described as the practice to have only one mariner called in at a time to execute, without any witness on his part to testify the reading and execution. It is more than matter of doubt, whether one of the mariners signed before he arrived

But not content with this explicit declaration of its intention, the legislature, instructed by the faults which pervade the present structure of these instruments,<sup>1</sup> has been careful also to prescribe the very mode in which they shall be made out; and accordingly, in schedules subjoined to the act, two forms are given as applicable respectively to distant voyages, and to the coasting trade and fisheries on the coast. The first of these contains an undertaking on the part of the seamen to serve in the capacities severally specified in *the intended voyage*, with a direction that the voyage shall be described "as nearly as can be done, as well as the places at which it is intended the ship shall touch, or if that cannot be done, the nature of the voyage in which the ship is to be employed:" the second contains a like undertaking on the part of the crew to serve on board the ship, but without specifying any particular voyage, instead of which a description is to be given "of the nature of the ship's employment, whether in the fisheries or on the coast, or in trading from one part of the United Kingdom to another, or to any of the Islands of Jersey, Guernsey, Alderney, Sark and Man, or to any port on the continent of Europe between the river Elbe inclusive and Brest." Both conclude with a reciprocal undertaking on the part of the master to pay for such service duly performed, the wages set opposite to the names of the seamen in the list thereunder written; which list is to be in the form and to contain the particulars following:

at the equinoctial line, though required [by the then statute] to do it within three days after entering."

<sup>1</sup> See a form of Articles in general use given in the Appendix to Ab. on Ship. No. V. "As to the present structure of these instruments," observes Lord Stowell, "it would take me up a very inconvenient time to point out half the impertinences with which it is stuffed, and which it is high time should be corrected." In the case of the *Minerva*, his lordship had pronounced a graver censure on the "engagements of a very special nature, which the ingenuity of later times had introduced into such contracts, not warranted by the general law and imposing new obligations on the mariner." The statute indeed (2 Geo. II., c. 36, s. 2) had declared that the agreements or contracts required thereby should, after the signing thereof, be conclusive and binding to all parties. But the Court of Admiralty, construing these words strictly, had confined their operation to *such* contracts as were specified in the preceding section, that is to say, to the contract for service and for wages merely, assuming an equitable jurisdiction to disregard such special clauses as it was impossible the seaman could have understood or intended to be bound by.

PLACE AND TIME OF ENTRY.				Men's Names.	Age.	Place of Birth.	Quality.	Amount of Wages per calen. Month, Share, or Voyage.	Witness to Signature.	Name of Ship in which Seaman last served
Name of Place.	Day.	Month.	Year.							

And inasmuch as, notwithstanding these directory provisions, special clauses might still find their way into the articles, which however injurious to the seaman, and at variance with the spirit of the statute, might nevertheless, unless clearly shown to have been surreptitiously or fraudulently introduced, be held binding in law as the express convention of the parties, the act proceeds to declare that no "agreement made contrary to, or inconsistent with the provisions thereof, nor any clause whereby a seaman shall consent to forego the right which the maritime law gives him to wages in the case of freight earned by ships subsequently lost, or containing any words to that effect, shall be valid or binding on any seaman signing the same."<sup>1</sup>

As the law stood before the passing of this act, the contract, when signed, remained in the custody of the master. The seaman had no access to it—no opportunity of inspection—and no means, therefore, of learning the terms of his engagement but from such confused and imperfect recollection as he might chance to retain of a technical document "stuffed with impertinences," once hastily read over to him, (if indeed at all,) and never intelligibly explained. It is true that in suits for the recovery of his wages it was incumbent, not on him, but on the master or owner, to produce the articles; but the consequence was, that they were produced only when the claim could be defeated by reason of some special condition, of the existence of which the poor mariner was altogether unconscious, and which he might unwittingly

<sup>1</sup> S. 5. The reason and effect of these latter words, which owe their introduction to a suggestion of the writer, will be explained hereafter when we come to treat of the wages.

have failed to observe. But the statute before us,<sup>1</sup> “to the intent that every person who may be interested in any such agreement may at all times have the means of knowing the terms and conditions thereof,” considerably provides, that in the case of ships trading to parts beyond the seas, and where the agreement, therefore, is in the form first given, the *owners and master, or one of them*, shall, on reporting the ship’s arrival at her port of destination, deposit with the collector or comptroller of the customs at such port, a true copy of the agreement, attested by the signature of the master; and that in the case of ships employed in the fisheries on the coast or in the coasting trade, and to which the second form is applicable, the *owners, or one of them*, shall, within ten days after the 30th of June and 31st of December in every year, deposit with the collector or comptroller of the customs of the port to which the ship belongs, a true copy of every agreement which shall have been entered into with any person composing part of the crew within the preceding six months, attested by the signature of such owner; and further declares, that the copies so deposited shall, when required to be produced in evidence on the part of any seaman, be received and taken as legal proof of the contents of the agreement.<sup>2</sup> In a subsequent clause it is added, that in cases in which it may be necessary that the agreement should be produced to sustain a claim on the part of a seaman, no obligation shall lie upon the seaman to produce it, nor shall any seaman fail in any suit or proceeding for the recovery of his wages for want of the production of any such agreement, or of any deposited copy thereof, or for the want of any notice to produce the same.<sup>3</sup>

Severe penalties are imposed upon the *master* for the infringement or neglect, on his part, of these several regulations;<sup>4</sup> a penalty, namely, of 10*l.* for every seaman carried out without having first executed the agreement—of 5*l.* for every neglect to cause the agreement to be distinctly read over—and of 50*l.* for neglecting to deposit a copy of the agreement, or for wilfully depositing a false copy; but by an unfortunate oversight (for such we must suppose it) in those cases, neither the least numerous nor the least important—

<sup>1</sup> S. 3.<sup>2</sup> S. 3.<sup>3</sup> S. 5.<sup>4</sup> S. 4.

in which the duty of depositing a copy of the agreement is cast upon the *owner* alone, no penalty is assigned for the omission to deposit, or (for what it may be hoped will be of rare occurrence) the wilful falsification of the document.<sup>1</sup>

Other regulations of the like kind, "for more effectually securing a compliance with the provisions of the act," are to be found in subsequent clauses. Thus every master is required, under a penalty of 25*l.*, on his arrival at any foreign port where there shall be a British consul or vice-consul, to deliver to him the agreement with his ship's crew, to be by him preserved during the ship's stay there, and to be returned to the master before his leaving the port,<sup>2</sup> and, under a like penalty, to produce it when required to the captain, commander, or other commissioned officer of any of his majesty's ships.<sup>3</sup> He is moreover, for reasons sufficiently apparent, expressly forbidden, under a penalty of the same amount, to ship any seaman at a foreign port without the privity of the consul or vice-consul, to be indorsed or certified on the agreement.<sup>4</sup>

As in the former statutes, so in this, there is nothing which renders a verbal contract for the service of a seaman absolutely void. If, however, a written agreement, as required by the statute, have been in fact executed, it will, when produced, be conclusive as to the terms of the engagement. No remuneration, therefore, can be recovered beyond that specified, even though upon an express promise, for duty however severe performed in the same capacity.<sup>5</sup> Still, if in

<sup>1</sup> It is sincerely to be hoped that the humane intention of the legislature will not be frustrated, as regards coasting and fishing vessels, by this omission, and that the owners of such vessels will comply, as is their duty, with the requisitions of the statute. The defect will probably be supplied in the next session; but if the advantage of *consolidation* is to be preserved, it will be necessary to re-enact the whole statute. Some difficulty may perhaps be felt upon whom the penalty should fall where there are several owners. Probably the best way would be to cut the knot, by making any one of them liable, leaving him to his remedy over against the managing owner, or party really in default.

<sup>2</sup> S. 48.

<sup>3</sup> S. 50.

<sup>4</sup> S. 49.

<sup>5</sup> *White v. Wilson*, 2 Bos. & Pul. 116; *The Isabella*, 2 Rob. Adm. Rep. 241; *Elsworth v. Woolmore*, 5 Esp. N. P. C. 84; Ab. on Sh. 440; and see *Harris v. Watson*, Peake's N. P. C. 72; and *Stilk v. Meyrick*, 2 Campb. 317. But if from circumstances the capacity in which the seaman acts be altered during the voyage,—as if, by the death or dismissal of the chief mate, the second mate suc-



any suit instituted by a mariner for wages, the articles shall not be produced on the part of the owner or master, or, being produced, shall be found inconsistent with the provisions of the act, and consequently void, the seaman will be entitled to recover a remuneration for his services, either upon the verbal engagement, if susceptible of proof, according to the rate agreed, or upon the *implied* hiring, according to the fair estimate of their value.

We proceed, secondly, to consider the service. The seaman, having signed the articles, is thenceforth bound to the ship as the covenanted servant of the owners represented in the person of the master; and in addition to, or rather in enforcement of, the obligations resulting from this relation at the common law, various statutory provisions are made for securing the faithful performance of the engagement, or punishing the wilful violation of it. And 1st, to prevent, if possible, a practice by no means uncommon among seamen, of withdrawing themselves from the ship after the execution of the contract, oftentimes to the serious inconvenience of their employers, it is in the present statute enacted, that in case a seaman shall at any time, after having signed the agreement, neglect or refuse to join his ship, or to proceed to sea in her, or shall absent himself therefrom without leave, he may, upon complaint of the fact made on oath by the master, mate, or owner, be apprehended by warrant of any justice of the peace near to the place where the ship shall happen to be, and unless he shall give a satisfactory reason for his neglect, refusal or absence, as the case may be, may be committed to the House of Correction, to be there kept to hard labour for a period not exceeding thirty days; or if the seaman, when brought before him, shall consent to join the ship and proceed upon the voyage, such justice may, at the request of the master, cause him to be conveyed on board, or to be delivered up for that purpose; and in this case he is further empowered to award to the master the reasonable costs of the apprehension, not exceeding the sum of 40s., to be

ceed to his place and performs the duties of that office,—in that case the former contract is superseded and dissolved, and a new engagement is formed, either expressly or by implication, for the new service, entitling the party to an altered rate of remuneration. See the case of *The Providence*, 1 Hag. Adm. Rep. 891.

chargeable against, and abated from, the accruing wages of the seaman.<sup>1</sup>

The seaman, as well by the nature of the contract of hiring as by express undertaking in the articles, pledges himself to the faithful performance of the stipulated service, and it is upon the condition and in consideration of such performance, that wages by way of compensation are to be paid by the master.<sup>2</sup> By the common law, therefore, a wilful absence from, or perverse neglect of duty, being a breach of the precedent condition of due performance on his part, would disentitle him to the wages stipulated in the agreement, and by the policy of the maritime law acts of mutinous disobedience are punished by the forfeiture even of the wages previously earned on such parts of the voyage as have been already accomplished. But it is obvious, that to discharge a seaman during the period of his service is seldom possible, or, if possible, expedient; whilst on the other hand, the permitting him to return, or continuing him in his employment as before, purges the offence, and is deemed by the law to be an entire dispensation and waiver of the forfeiture. It follows, therefore, that if left to the operation of the common law, misconduct of this kind, however injurious to the employer, and of mischievous example to others, would for the most part go unpunished. The statute however steps in, and supplies the deficiency by enacting, first,

<sup>1</sup> S. 6. And the more effectually to remove all real or pretended impediments to the fulfilment of his engagement by the mariner, a subsequent clause (s. 7) provides, that no debt exceeding in amount 5s., incurred by any seaman after the agreement shall have been signed, shall be recoverable until the conclusion of the voyage—that no keeper of a public-house or lodging-house shall detain any chest, or other effects of a seaman, for any pretended debt alleged to have been contracted by him—and that, in case of such detention, any justice of the peace may, upon complaint on oath by the seaman, or on his behalf, inquire into the matter, and if he shall see right, by warrant under his hand and seal cause the effects so detained to be seized and delivered over to the seaman. From the language of the latter provision, it seems that it is not intended to deprive the tavern or lodging-house keeper of his lien for a *real* debt, but merely to give a summary mode of recovering the effects when detained upon an unfounded claim. Whether this was all which the legislature meant to do may be doubted.

<sup>2</sup> The consideration, we apprehend, is regarded by our law, as by that of other countries, as divisible. Thus in a voyage out and home, when the outward voyage is complete, the seaman, it is conceived, has earned wages, if he has duly performed his service up to that time, and the vessel has earned freight.

that if any seaman, after having signed the agreement, or after the ship shall have left her first port of clearance, and before the expiration of his term of service, shall wilfully absent himself from the ship or otherwise from his duty, he shall (in all cases not of absolute desertion, or not treated as such by the master) forfeit out of his wages to the master or owner two days' pay for every twenty-four hours of such absence, and a like proportion for any less period of time, or (at the option of the master) of the amount of expenses incurred in hiring a substitute to perform his work; secondly, that in case any seaman shall, without sufficient cause, neglect to perform such his duty as shall be reasonably required of him by the master or other person in command, he shall be subject to a like forfeiture in respect of every such offence, and of every twenty-four hours' continuance therefrom; and thirdly, that if any seaman after having signed the agreement, or after the ship's arrival at her port of delivery, and before her cargo shall be discharged, shall quit the ship without a previous discharge or leave from the master, he shall forfeit to the master or owner one month's pay out of his wages.<sup>1</sup> To guard, however, against abuse in the abatement of wages for alleged forfeitures, a proviso is added, that none such shall be incurred unless the fact of the seaman's temporary absence, neglect of duty, or quitting the ship, shall be duly entered in the ship's log-book, which entry is to specify truly the hour of the day at which the same shall have occurred, and the period during which the absence or neglect of duty shall have continued. It is made incumbent, moreover, on the owner or master, in all cases of dispute, to substantiate the truth of the entry by the evidence of the mate or some other credible witness.

Absolute desertion from the ship is of course a graver of-

<sup>1</sup> S. 7. Where the contract for wages is not by the month, but so much for the voyage or run, a mode of calculating the forfeitures is adopted like that prescribed by the 31 Geo. III. c. 39, s. 9, in respect to coasting vessels, that is to say, if the whole period of the voyage exceed one calendar month, the forfeiture of a month's pay is to be taken as a forfeiture of a sum bearing to the whole wages the same proportion as one calendar month would bear to the whole time of the voyage; and in like manner as to the forfeiture of two days' pay. If the whole voyage do not exceed the month or the two days, the forfeiture in that case will be of the whole wages. S. 8.

fence, and one which by the maritime law of all states is visited by the forfeiture of all wages previously earned.<sup>1</sup> In this country the law was so declared by an act passed in the reign of William the Third,<sup>2</sup> and again by the before-mentioned statute of George the Second.<sup>3</sup> But the present statute goes further, and enacts, that every seaman who shall absolutely desert the ship to which he belongs, shall forfeit to the owner or master all his clothes and effects on board, as well as all wages and emoluments to which he might otherwise have been entitled ; provided however, that the circumstances attending such desertion be entered in the log-book at the time, and be certified by the signature of the master and mate, or other credible witness : moreover, if the desertion take place in parts beyond the seas, any increase of wages which the master may have been compelled to pay to a substitute may be recovered by summary proceeding from the deserter: and it is declared, that an absence from the ship for any time within the space of twenty-four hours immediately preceding the sailing of the ship without permission from the master, or for any period, however short, under circumstances plainly showing that it was not the intention to return, is to be deemed an absolute desertion.<sup>4</sup>

Upon these several provisions it is necessary to make some observations. In the first place none of them, we apprehend, is to be considered as superseding or abrogating the common law. And this it is the more important to bear in mind, because certain acts being required of the master, in default of which the forfeitures do not attach, cases will frequently occur where, from the omission or imperfect performance of such acts, the statutory penalties will not be recoverable. Thus, to take the case of desertion, if the entry in the log-book shall not have been correctly made and certified as required, the statutory penalty does not attach, and there will consequently be no forfeiture of the clothes and effects of the deserter remaining on board. But the

<sup>1</sup> See the references in note (s) Ab. on Sh. 463.

<sup>2</sup> 11 & 12 W. III. c. 7, s. 17.

<sup>3</sup> 2 G. II. c. 36, s. 3.

<sup>4</sup> S. 9. By section 10 any person knowingly harbouring or secreting a deserter incurs a penalty of £10.

common law will be applicable, and the wages and emoluments, therefore, will still be subject to forfeiture. Again, with respect to the offence of quitting the ship without a previous discharge after her arrival and before unloading, which under the statute entails a forfeiture of one month's pay, this, it is conceived, is to be understood only of a temporary quitting, and not of an actual abandonment of the vessel, which, by the severity of the maritime law, even in the port of final destination, is accounted a desertion, and punishable therefore by an entire forfeiture of the wages.<sup>1</sup>

The wilful absence or desertion contemplated by the statute must be an absence without justifiable cause. Whatever at the common law would be deemed a valid excuse will equally furnish an exemption from the penalties of the act. An absence, therefore, or desertion, occasioned by the tyranny, or other misconduct of the master,<sup>2</sup> by an inadequate supply of provisions, or the like, is clearly justifiable.<sup>3</sup> Again, the refusal to proceed on a voyage not designated by the articles is not such a desertion as works a forfeiture;<sup>4</sup> and it is unnecessary to say that an absence, however long, proceeding from the application of a *vis major*, as in the case of an embargo or detention by the sovereign of a foreign

<sup>1</sup> See the case of the *Baltic Merchant*, Smith, Edw. Adm. Rep. 86, and the judgment of Lord Stowell thereon; see also *The Pearl*, Denton, 5 Rob. 224. For ourselves, we cannot help entertaining some doubt whether it was not the intention of the legislature to make the absolute quitting of the vessel after her arrival without a discharge, punishable *only* by the forfeiture of a month's wages, which certainly seems to be a penalty fully commensurate with the offence. But if this were the intention, it is certainly not effectuated.

<sup>2</sup> *Limland v. Stephens*, 3 Esp. N. P. C. 269, where Lord Kenyon said, "Desertion is a forfeiture of wages; but if the captain conduct himself in such a way as puts the sailor into a situation that he cannot, without danger to his personal safety, continue in his service, human nature speaks the language—a servant is justified in providing for that safety. Nor, as is well observed by a celebrated writer, (Bell's Com. ch. iv. sec. 1, § 4), would the doctrine be restricted to the case of danger to personal safety. Cruel inhuman usage, though it do not actually endanger life, would seem to be a justification of desertion. See also the *Favourite*, 2 Rob. 232.

<sup>3</sup> See the cases of the *Castilia*, 1 Hag. 59; *The Eliza*, 1 Hag. 186; *Train v. Bennett*, Moody & Malk. N. P. C. 82.

<sup>4</sup> *The Eliza*, 1 Hag. 182; *The Countess of Harcourt*, 1 Hag. 248; *The Cambridge*, 2 Hag. 243. And see *The Minerva*, 1 Hag. 347.

state, can never be accounted wilful.<sup>1</sup> It is a desertion, if a mariner who has left the ship upon leave of temporary absence, refuse to return when required;<sup>2</sup> but if even a colour of sanction have been given to the absolute quitting of the vessel, if the seaman may reasonably have supposed that it was with the master's consent, however hastily and perhaps undesignedly given, the Court will put an indulgent interpretation on his conduct, and will not visit it with the consequences of a desertion.<sup>3</sup> In all these cases much of course depends on minute circumstances incapable of precise generalization, of which the effect must be determined by the tribunal before which the question may be brought. The above may serve for examples: and for the rest, it may be sufficient to suggest that the master or owner, after a due regard to the maintenance of discipline on board, ought not to be extreme to mark what is done amiss; and that an eagerness to insist on forfeitures would be unbecoming in those upon whom the law has bestowed the benefit resulting from them. Even an unequivocal act of desertion may sometimes with propriety be treated as the lesser offence of a truant absence; for it will be observed, that as the law now stands, the receiving back of the offender, though it takes away the forfeiture incurred by the desertion, does not exempt him from the minor penalty for a wilful absence from duty.<sup>4</sup>

There is one case of a wilful abandonment of the service, for which express provision is made by the legislature. It is obviously of the last importance to encourage voluntary enlistment into the navy. The statute, therefore, following in this respect the act of George II.,<sup>5</sup> provides "that nothing in the act, or in the agreement, shall be deemed to extend to prevent any seaman from entering or being received into the

<sup>1</sup> See the case of *Beale v. Thompson*, decided with a reference to the former statutes, in which the word *wilful* does not occur, 4 East, 546.

<sup>2</sup> *The Bulmer*, 1 Hag. 163.

<sup>3</sup> *The Frederick*, 1 Hag. 211, and *The Ealing Grove*, 2 Hag. 15. Cases which will well repay the trouble of perusal, as showing the disposition of the Court of Admiralty in the interpretation of ambiguous acts of misconduct.

<sup>4</sup> For the clause, as has been seen, speaks of all such absences, as do not amount to a desertion, or are not treated as such by the master.

<sup>5</sup> 2 Geo. II., c. 36.

naval service of his majesty, nor shall such entry be deemed a desertion from the merchant ship, nor incur any penalty or forfeiture whatever, either of wages, clothes, or effects; and all masters and owners of ships are strictly prohibited from introducing into any ship's articles any clause by which any penalty or forfeiture of any kind is agreed to be incurred by seaman upon his entry into his majesty's service."<sup>1</sup>

With respect to the general behaviour of the seaman on board, it has been already stated,<sup>2</sup> that he is bound, and expressly engages, to conduct himself in an orderly, faithful, honest, careful, and sober manner, to be diligent in his duty, and obedient to the lawful commands of the master. The systematic breach of any of these duties (for occasional deviations will be regarded with indulgence),<sup>3</sup> turbulence, dishonesty, negligence, drunkenness, idleness, disobedience—these, as well as general incapacity for the service which he has undertaken, will justify the dismissal of the seaman, and entail the forfeiture of his wages.<sup>4</sup> Moreover, by a rule of the maritime law universally recognised, losses occasioned to the owner by reason of the embezzlement, loss, or destruction, of any portion of the cargo or stores by the peculations, mischief, or negligence of the seamen, may be made good by an abatement from the wages (so far as they will extend) of the individuals guilty of such misconduct.<sup>5</sup> Their liability in this respect is considerably notified in the articles: and they are further apprised, that if any seaman shall enter himself as qualified for a duty to which he shall prove to be not competent, he will be subject to a reduction of the rate of wages in proportion to his incompetency.<sup>6</sup>

<sup>1</sup> But a forfeiture actually incurred will not, it seems, be purged by the entry of the seaman into the king's service. See the case of *The Amphitrite*, 2 Hag. 403.

<sup>2</sup> In the last Number.

<sup>3</sup> See *The New Phoenix*, 1 Hag. 199; *The Lady Campbell*, 2 Hag. 5; and the *Malta*, 2 Hag. 168.

<sup>4</sup> *The Exeter*, 2 Rob. 261. A case deserving to be consulted.

<sup>5</sup> *Molloy*, book ii. ch. iii. s. 9; 2 *Show*. 167; 1 *Ld. Raym.* 650. That it is confined to the guilty individuals, see *Thompson v. Collins*, 1 *N. R.* 347.

<sup>6</sup> This is so stated in a note to the articles, and probably would be found to be the legal effect. The non-performance, or rather inadequate performance of the service promised, would prevent, we apprehend, the seaman from recovering more

We shall conclude this part of the subject by a few observations, which cannot be too strongly impressed on the minds of both officers and crew. The duty of the mariners is not confined to the mere navigation of the ship. In the intermediate ports, as well as at the port of final discharge, until regularly dismissed, or unless otherwise stipulated, they are bound to give their aid in the stowing and unloading of the cargo<sup>1</sup> and in the care and preservation of the vessel and her stores: even when no active service is required, they are still under the control, and subject to the orders of the master. In the voyage, under all circumstances, prosperous or adverse, their best exertions must be given. In the midst of storms and in the horrors of shipwreck, the full and unreserved application of all their energies is strictly due from them. They are bound to the vessel so long as enough remains of her to deserve the name of a ship; and even when her timbers are broken up and scattered it is still their duty, as we shall hereafter see it is their interest also, to assist in rescuing whatever can be saved of the cargo and materials. All this they have undertaken to do in entering themselves on board. It is part of their covenant,—an incident of the relation in which they stand as hired seamen. There is no such thing as *extraordinary* service; and, by consequence, no right, legal or moral, to extraordinary remuneration.<sup>2</sup>

Let us see, then, thirdly, what compensation for their services the law does afford to this adventurous and important class of labourers. The remuneration for the services of seamen includes subsistence, care and medicines in case of sickness, and wages. Wages are estimated either by the month, or by the voyage or run, or by a share in the proceeds. But as a participation in profits, which is the rule universally adopted in the southern whale fishery, constitutes a partnership, and does not therefore properly fall under

than the *quantum meruit*; which is but another way of saying that a proportionate reduction would be made of the stipulated wages.

<sup>1</sup> 2 Hag. 246.

<sup>2</sup> Accordingly, seamen are not admitted to claim as salvors; and promises to pay extra wages, given in cases of emergency, are treated as void in law, being unsupported by any consideration. See the remarks of Lord Stowell, in *The Neptune*, 1 Hag. 236.



the denomination of wages,<sup>1</sup> our attention may be confined to the two former. These things premised, we proceed to treat of the earning of wages—of the time and mode of paying them—and of the means of enforcing payment.

I. Of the earning.—“The right of the mariner to wages,” as was well observed by Lord Ellenborough, “depends, first, upon the earning of freight by his owners in that voyage for which he was hired; and secondly, upon the performance by the mariner of the service which he has agreed to perform in respect to such owners during the voyage.” We will consider these conditions in the inverse order.

Performance of the service is a condition precedent to the title to wages. When complete, the right at once attaches; when incomplete, the question whether any and what wages are payable, is one which requires a more detailed examination. The failure of performance may arise from the act of the seaman himself; from the act of his employer; or from circumstances over which neither the one nor the other has any control.

1. From the act of the seaman himself—as from desertion, continued refusal to work, or entering into the naval service of his Majesty. In the two former cases no wages are payable; the condition has not been fulfilled, and the obligation to pay therefore does not attach. Moreover, as has been already stated, even the wages which may have been previously earned, but not then payable, are absolutely forfeited to the employer. But for the other case careful provision is made by the statute, which enacts,<sup>2</sup> that when any seaman shall quit a merchant ship in order to enter into his Majesty's naval service, and shall thereupon be actually received into such service, not having previously committed any act amounting to and treated by the master as a total desertion, he shall receive, in case the ship has earned freight, im-

<sup>1</sup> It is said, indeed, that Lord Alvanley in one case held that seamen, having stipulated for a share in the proceeds, were not to be considered as partners, but entitled to wages to the extent of their proportion in the proceeds of the voyage; and to sue for them in a court of law, though the account had not been settled. *Wilkinson v. Fraser*, 4 Esp. N. P. C. 182. It is difficult to see on what principle the decision was founded. Mr. Bell, in his commentaries, states, that by the law of Scotland it is not held to be a partnership; but admits it to be an exception.

<sup>2</sup> S. 45 and 46.

mediate payment of an amount of wages proportioned to the period of his actual service; or if no freight has been earned, a bill upon the owner for the amount, if ascertainable, payable on the ship's safe arrival at her destined port; or if the amount be not then ascertainable, a certificate from the master of the period of his services, and the rate of wages he is entitled to.

2. *From the act of the employer.*—Thus, after the execution of the contract and partial service performed under it, the voyage may be abandoned and the seamen dismissed. In such a case it has been decided that wages are payable for the time during which the mariners have been actually employed;<sup>1</sup> and it seems reasonable, as intimated by Lord Tenterden in the excellent treatise to which reference has been so frequently made, and it is clearly in accordance with the principles of our law, “that if they sustain any special damage by the breaking off of the contract, they should recover such damage by an action upon the agreement.”<sup>2</sup> Again, it may and occasionally does happen that the master discharges a seaman during the course of the voyage for alleged misconduct. In doing this, of course, he acts upon his own responsibility; if the misconduct be established, and be such as to warrant the dismissal, the wages will be lost; but if the justification of the master be not clearly and satisfactorily made out, the seaman will recover all the wages to which he would have been entitled upon the prosperous termination of the voyage, as well as the cost of subsistence, and the extraordinary expenses incurred in reaching the port of final destination.<sup>3</sup> By a clause in the new statute, beneficial alike to the master, as relieving him from the exercise of a hazardous discretion, and to the seaman, as affording him a protection against arbitrary authority, it is enacted,<sup>4</sup> that no

<sup>1</sup> *Wells v. Osman*, 2 *Ld. Raym.* 1044. Lord Ellenborough indeed is stated to have decided, that if the ship be not sea-worthy at the outset, and the voyage be discontinued on that account, a seaman is not entitled to wages, though, perhaps, he may maintain a special action against the owner for damages. *Eaken v. Thorn*, 5 *Esp. N. P. C.* 6. Wages upon the articles clearly could not be recovered.

<sup>2</sup> *Ab. on Sh.* 450.

<sup>3</sup> *The Exeter*, 2 *Rob.* 261; *The Gerson*, 3 *Rob.* 92; subject, however, to a deduction of any sum which he may have actually earned in the meantime in another service.

<sup>4</sup> *S.* 41.

master shall discharge any individual of his crew at any of the British colonies, without the previous sanction in writing of the governor, lieutenant-governor, secretary, or other officer appointed in that behalf by the government there; or in the absence of all such authorities at or near to the port at which the ship shall be then lying, then of the chief officer of customs at such colony, resident at or near to such port; nor shall he discharge any such person at any other place abroad, without the like previous sanction in writing of his Majesty's minister, consul, or vice-consul there, or in the absence of any such functionary, then of two respectable merchants resident there; all of which said functionaries respectively are authorized and required, and all which said merchants are authorized, in a summary way, to inquire into the grounds of any such proposed discharge, by examination upon oath, and thereupon to grant or refuse such sanction according to their discretion, having regard to the objects of the act.<sup>1</sup>

3. The non-performance may arise from circumstances beyond the control of both, and these either as affecting the condition of the mariners, or as interrupting or entirely putting an end to the adventure. Of the first kind are the sickness, death, or forcible impressment of the seaman: thus, 1st. If either by an accidental hurt received in the performance of his duty, or by sickness supervening in the course of the voyage, a seaman be rendered incapable of active service, he will, never-

<sup>1</sup> A similar provision is made, as we had occasion to observe in our last article, in the case of seamen left behind in any place beyond the seas, on the plea of desertion, disappearance, or incapacity to proceed, and by a subsequent clause it is enacted, that in any indictment or proceeding against the master in respect of such abandonment, the proof of his having obtained such sanction or certificate shall be upon him, "it being the intention of the act, that, except in the case of entering into his Majesty's naval service, no person of the crew shall be discharged, either with or without his consent, in any place abroad where such functionary can be found, unless he shall have given such sanction thereto." Whether in suits for wages, where the master rests his defence on a discharge of the seaman justified by misconduct, it will be incumbent on him to prove such sanction, and if so, what degree of credit or authenticity is to be attached to the certificate itself, are questions by no means unimportant, which are not determined by the act, and on which we are not disposed to hazard a confident opinion. We are inclined to think that the statute is not applicable to such a case, and consequently that no such proof is required. There can be no doubt, however, that the production of such a document properly authenticated would afford *strong* evidence of the justifiableness of the discharge.

theless, if suffered to remain on board, be entitled to his full wages.<sup>1</sup> The statute, moreover, humanely requires<sup>2</sup> that a supply of medicines shall be kept on board suitable to accidents and diseases arising on sea voyages, and that the expense of providing the necessary surgical and medical advice and attendance, and the medicines which the seaman shall stand in need of, until he shall have been cured, or shall have been brought back to some port of the United Kingdom, shall be borne by the owner and master, or one of them, without any deduction whatever on that account from the seaman's wages. If his condition be such that he is unable to proceed, and it has become necessary, with the sanction required by the act, to leave him on shore, he will be entitled, as it is conceived, to wages calculated up to the period of his leaving the vessel, on the same principle and subject to the same conditions which are applicable to the case of a seaman quitting for the naval service.<sup>3</sup>

2. In case of the death of a seaman during the voyage it has been generally assumed that, in the absence of any stipulation inconsistent with the right, something is due to his representatives in respect of the service actually performed; but it has been made a question on what principle the amount was to be calculated, and something of a distinction has been hinted between monthly wages and those estimated by the voyage.<sup>4</sup> Looking, however, to the principle of the contract, the case does not seem to present much difficulty. Complete performance of the engagement has been prevented by the act of God. This works no forfeiture (for

<sup>1</sup> *Chandler v. Grieve*, 2 H. Bl. 606, note (a), and by Lord Mansfield in *Paul v. Eden*, Ab. on Sh. 442. The conclusion, however, rests on general principle quite as much as on authority.

<sup>2</sup> S. 18.

<sup>3</sup> The 44th section of the new act contains a provision for the payment of the wages of the seaman so left behind, to which we shall have occasion to advert hereafter.

<sup>4</sup> Ab. on Sh. 445, from which book we quote the following passage:—"If a seaman falls sick and dies during the voyage, the laws of Oleron, of Wisburg, and of the Hanse Towns, direct that his wages shall be paid to his heirs, in general words, without distinction as to the terms on which he was hired; and it is not clear whether the payment thus directed is to be understood of a sum proportionate to the time of his service, or of the whole sum that would have been earned if he had lived to the end of the voyage. The French ordinance distinguishes between

by a maxim of the law the act of God prejudices no man; but simply puts an end to the contract from the moment when it takes place. What then is the legal effect of this position? If at the time of the death freight have been earned, the deceased seaman (unless, indeed, he have stipulated at so much for the whole voyage out and home, and the vessel be lost before she reach home,) will also have earned wages, and his *vested interest* in that sum, whatever it may be, will pass to his personal representatives. If freight be subsequently earned in respect of a portion of the voyage during some part of which the seaman was on board, his representatives, we apprehend, will be entitled to a further sum in proportion to the period of such subsequent service; and in like manner, if at the time of the death freight were in the course of being earned, none having been earned previously; because, although by the termination of the contract, the whole service in respect of which the wages were stipulated has not been performed, yet for the service actually rendered a compensation is due according to its worth, and the estimate of that worth would of course be formed according to the actual agreement of the parties. If no freight be earned at all, as the seaman, if living, would in

the case of a hiring by the month and a hiring for the voyage, and in the first case directs the payment of wages up to the day of the death of the seaman; in the last case it directs the payment of half the stipulated sum, if a seaman dies on the voyage outward; and the whole if he dies on the voyage homeward. A similar rule had been laid down in the case of a hiring by the voyage in the ordinance of Charles the Fifth, which regulated the commerce of the Low Countries, and Clairac and Valin say, that the same rule was established by the Consolato del Mare." In the only two cases which have come before the tribunals of this country the question has not been directly decided; for in *Cutter v. Powell*, 6 T. R. 320, the judgment turned on the terms of a promissory note for the wages which had been given to the deceased, and which imported a contract to be paid a gross sum for the whole voyage; and in *Armstrong v. Smith*, 1 N. R. 299, the only point of controversy was whether the master having accounted, as required by the statute, to Greenwich Hospital for the wages, that account was to be deemed final and conclusive; and the Court, as may be supposed, held, that it was not to be so deemed. We shall not attempt any detailed justification of the rule which we have ventured to lay down in the text, which, however, we cannot help thinking will be found consistent as well with the principles of jurisprudence as with natural equity. It is to be regretted that some positive rule was not laid down in the new statute. Provision has been made for the mode of payment by a former statute, which will be noticed hereafter.

that case have had no claim, so neither of course will his representatives. The mode of estimating the wages will not, as it seems, in any way affect the result; for whether monthly, or by the voyage, they will equally, it is conceived, be payable in the proportion of the service to the whole duration of the voyage. Thus, suppose the entire voyage to have lasted 300 days, and the period of service to have been 250, in either case the wages payable will be to the wages for the full period as 250 to 300; or, in other words, will be five-sixths of the whole. 3. The same rule, it is apprehended, will apply to the case of a seaman impressed into the service of his Majesty during the currency of his contract, the non-completion of the engagement in both cases being the result of an irresistible necessity.<sup>1</sup>

Other circumstances, independent of the will of the parties, prevent the fulfilment of the service by interrupting or putting an end to the adventure. Such are—1. the breaking out of hostilities between this country and that to which the ship is destined, after the execution of the contract and before her departure. In this case, the contract between the ship-owner and the freighter being dissolved, so also is that between the seaman and his owner. Nothing, therefore, can be recovered for wages under the articles; though possibly for service rendered in getting the vessel ready for sea a reasonable compensation might be claimed.<sup>2</sup> 2. An embargo, or a seizure and temporary sequestration of the vessel in the port and by authority of the sovereign of a foreign state.<sup>3</sup> A proceeding of this nature, being a suspension only of the voyage, does not put an end to the contract, either between the merchant and the ship-owner,<sup>4</sup> or between the latter and

<sup>1</sup> Before the stat. 2 Geo. II. c. 36, it was held, that the seaman had no title to wages to the time of impressing; but it has since been decided as stated in the text. *Clements v. Mayborn*, Ab. on Sh. 444.

<sup>2</sup> It is so expressly provided in the *Ordonnance de la Marine*, liv. iii, tit. 4; and in the *Code de Commerce*, §53.

<sup>3</sup> These two cases are different. An embargo *ex vi termini* is a detention only. A seizure and sequester may be converted into a total confiscation. It is a more hostile act; but derives its true character from the result. In the text, we suppose restitution to be made. See the case of *Beale v. Thompson*, 3 B. & P. 405, and 4 East, 546.

<sup>4</sup> As will be shown hereafter.

the mariners ; and consequently if the vessel, for however long a time detained, ultimately reach her port of destination, and earn freight by delivering her cargo, the seamen who have remained with her to the end will be entitled to the full amount of their wages, as well as to the reasonable costs of subsistence for the time of their separation from the vessel.<sup>1</sup> 3. Hostile capture.—The non-completion of the service in this instance being occasioned by the interposition of a superior force, and not by any fault of the mariner himself, he would, according to the ordinary principles of jurisprudence, be entitled to compensation for the service actually performed up to the moment of its determination. But the policy of all maritime states, partly with a view of stimulating the zeal of the seamen by making their interest coincide with their duty, and partly, as it seems, under a notion of lessening the burden of a common disaster, by distributing the consequences of it among many, has made the payment of wages depend on the successful termination of the adventure.<sup>2</sup> Accordingly, if the vessel be captured in the voyage, the *accruing* wages, as the accruing freight, are altogether lost. Still, if the vessel be retaken before condemnation, and finally deliver her cargo in safety, the better opinion is,<sup>3</sup> that

<sup>1</sup> *Beale v. Thompson*, 4 East, 546. The judgment of Lord Ellenborough in that case is peculiarly worthy of attention. See also *Pratt v. Cuff*, cited in *Thompson v. Rowcroft*, 4 East, 43 ; and see the cases cited as determined in the Scotch Admiralty Court on the same question, in Bell's Com. ch. iv. sect. 1, §. 7.

<sup>2</sup> *Ab. on Shipping*, 457 ; *The Neptune*, 1 Hag. 232. The latter reason assigned in the text might be a satisfactory one before the practice of insuring freight was admitted ; and, indeed, in some countries, as in France, the interest in freight is still not recognized as insurable. In England, it is little better than a mockery upon the seaman to talk of dividing the loss. The merchant and the ship-owner can each of them cover every farthing of interest which they have, or may reasonably have calculated upon having, in the ship and her burden ; but the law does not allow the mariner to insure his wages, because that would be to defeat the policy which framed the rule of no freight no wages. "The mariner," says Lord Stowell, "goes to sea upon the single security of the freight. His labours and perils have nothing else to trust to. Freight is the mother, and the only mother, of wages ; if that goes, every thing goes : he has no step-father, if I may so say, in the character of insurer, to supply the loss." 2 Dods. 510.

<sup>3</sup> *Ab. on Sh.* 458 ; and see 4 East, 559. It was so decided by Lord Eldon, in *Bergstrom v. Mills*, 3 Esp. N. P. C. 36. Lord Holt, in *Wiggins v. Ingleton*, 2 Ld. Raym. 1211 ; and Ch. J. Eyre, in *Curling v. Mills*, 1 B. & P. 637, seem to have thought otherwise : on principle, however, it should certainly be as stated in the

all parties are thereby reinstated in their original relations; that the contract is to be considered as having subsisted without interruption; and consequently that, subject perhaps to some reduction by way of salvage,<sup>1</sup> the whole amount of the stipulated wages is to be paid. In like manner, in case of shipwreck, a total loss and destruction of the vessel draws with it also a total loss of the accruing wages. But by a recent most just and most beneficent decision of the Court of Admiralty,<sup>2</sup> the rigour of the rule has been so far relaxed that if by the exertions of the crew any portion of the vessel be preserved, their right to wages will be saved, and what is rescued from the waves will furnish, so far as it may extend, a fund for the payment. "A seaman," as Lord Stowell strongly and eloquently expresses himself, "has a right to cling to the last plank of his ship, in satisfaction of his wages or part of them."<sup>3</sup>

The severe though perhaps politic rigour which annexed the loss of wages to the loss of the vessel, gave birth to the well-known legal adage, that "freight is the mother of wages;" and it was this to which the mind of Lord Ellenborough was directed, when he stated one of the conditions of the earning of wages to be "the earning of freight by the owners in that voyage for which the seaman is hired."<sup>4</sup> It remains, therefore, in the second place, to examine this pro-

text. In *The Friends*, 4 Rob. 143, where Lord Stowell decided against the seaman's claim, it is to be observed, that the claimant did not return home with the vessel after her re-capture.

<sup>1</sup> In *The Friends*, 4 Rob. 143, Lord Stowell seems to consider that such a claim is subject to salvage.

<sup>2</sup> The case alluded to is that of *The Neptune*, 1 Hag. 227, in which Lord Stowell pronounced an elaborate judgment in favour of the right to wages, founded, as he expressed himself, "upon the grounds of the general practice of maritime states, upon the just policy of the rule, its simplicity and convenience, upon the legal nature and duration of the original contract, and upon the understanding of the law, which has generally, though silently prevailed." This judgment may be advantageously consulted by the student.

<sup>3</sup> It was stated by Lord Stowell, *ubi ante*, that the practice in the United States had been in accordance with this decision; but see the note by the reporter, (p. 234), in which this is rendered doubtful. Upon the whole, perhaps, it is to be considered as an innovation, though certainly a just one, upon the rule as to the earning of freight.

<sup>4</sup> 4 East, 562.



position, and to assign to it its true import and limits. That it is not to be taken in the unqualified generality in which it is here stated, is indeed obvious; for if the freight be lost by the special agreement,<sup>1</sup> or by the fault,<sup>2</sup> of the owners, or if the ship, having been sent on a seeking voyage, return disappointed and without a cargo, it would be absurd to suppose that in such cases the seamen would lose their right to remuneration.<sup>3</sup> Still, by the universal adoption of maritime states, the proposition holds *generally* true, that when freight has been earned, so also have wages; and conversely, that when no freight has been earned, no wages are payable. Now, the voyages for which seamen contract are of two kinds; being either a voyage to some port or ports direct, and there ending, or a voyage divisible into two or more parts; that is to say, out and home, or out and home with intermediate trips. In the former case, of course, no freight, properly so called, is earned until the arrival of the vessel at her port of destination; and consequently if she be lost, either by wreck or capture, in the passage, the whole wages are lost, unless, as has been said, some portion of the wreck have been saved, which may furnish a fund for the payment. The same rule applies to a divisible voyage, if the ship have been lost in her passage out, or, having gone out in ballast, be lost on her return before she has had an opportunity of earning freight. It seems, however, that even in these cases, if the owner have, by an arrangement with the merchant, received in advance the whole or part of the consideration for the carriage of the goods,<sup>4</sup> the seamen will in that case be entitled to a proportionate share of their wages.<sup>5</sup> But if the vessel has successfully accomplished one

<sup>1</sup> As where the owners agree not to demand freight till both the outward and homeward voyages have been completed. *Ab. on Sh.* 448; *Buck v. Rawlinson*, 1 Bro. P. C. 102.

<sup>2</sup> *The Malta*, 2 Hag. 158.

<sup>3</sup> *The Neptune*, 1 Hag. 232.

<sup>4</sup> Ordinarily, but incorrectly, called freight. In legal contemplation, it is the consideration for receiving the goods on board, and does not partake of the properties and incidents of freight.

<sup>5</sup> *Anon.* 2 Show. 283. This decision, however, we cannot but consider doubtful. It is impossible, in such a case, to say that freight has been earned, or any benefit accrued to the owners to which the exertions of the seamen have in any respect contributed.

portion of the adventure; if, for example, she has safely delivered her outward cargo, earning thereby freight properly so called, for her owners, then, though the wages may not be *payable* till the completion of the service, yet they have been *earned* to the extent of the service up to that time actually rendered,<sup>1</sup> and the seaman has a vested interest in the amount, indefeasible except by forfeiture from his own misconduct. In like manner, if intermediate voyages be made, wages will be payable up to the time of delivering the last cargo; and it was, therefore, that, in speaking of the loss of wages occasioned by the loss of the vessel, we were careful to confine it to the *accruing* wages only. To the rule, however, here laid down, one limitation must be annexed. The seaman may have stipulated for wages at so much for the voyage, and by the terms of the agreement the whole adventure may be consolidated into one voyage: in this case, if the vessel be lost in any part of her course, it is manifestly impossible that the wages can be estimated, and none consequently can be recovered.<sup>2</sup> By such an agreement, therefore, the seaman voluntarily foregoes the benefit which the law offers him, and must take care to compensate himself for the additional risk by a higher rate of remuneration. Nor, as the statute imperatively requires a particular description of the intended voyage, can the mariner, however unlettered, when he expressly stipulates for a gross sum upon the whole voyage, be reasonably supposed ignorant of the effect and consequences of his contract. But a practice not so defensible, and far more general, has at length received a positive prohibition.

For many years past, the equitable rule of the maritime law, by which freight was made to generate wages, had been rendered of none effect to the seaman by the introduction of

<sup>1</sup> Ab. on Sh. 447; 1 Ld. Raym. 639, 739; 12 Mod. 409, and see ib. 442; refer also to 3 Burr. 1844; Dong. 539; and the cases cited in 6 T. R. 320.

<sup>2</sup> In this respect we do not understand the statute as having made or intended to make any alteration. It expressly mentions, and cannot therefore intend to forbid hirings by the *voyage*; and though it preserves to the seaman the right given him by the maritime law to wages, yet we apprehend it must be taken as a part of the maritime law itself that a mariner may stipulate for wages by the *voyage*, and take his chance of the successful termination.

a clause into the articles, "that no officer or seaman, or person belonging to the ship, should demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the port of discharge, &c." This stipulation the Courts of Common Law had felt themselves bound to recognize and give effect to, as being the express convention of the parties,<sup>1</sup> although the Court of Admiralty, assuming a lofty tone of equitable prerogative, had granted a dispensation, rejecting the clause altogether as an immoral and fraudulent contrivance to deprive a simple mariner of his just rights; and certainly if such an assumption of jurisdiction could be warranted at all, it would be by the circumstances of the case in which it was exercised,<sup>2</sup>—a case which, though perhaps extreme, does therefore the better illustrate the mischief, we had almost said the cruelty and dishonesty, of the practice. The facts, as stated in the judgment of Lord Stowell, were briefly these:—William Lattimore, a seaman, was hired, in August 1820, to proceed, at certain wages, on board the *Juliana*, from Portsmouth, designed on a voyage to New South Wales, Batavia, Bengal, and back to London. She accordingly sailed with a cargo of convicts to the River Derwent in New South Wales, arrived and landed them there, took on board live stock and salt provisions, and sailed to Port

<sup>1</sup> The cases at common law on this point are, *Appleby v. Dods*, 8 East, 300, and *Jesse v. Roy*, 4 Tyrwh. 626. In the former, a seaman who had been hired at monthly wages, and had signed articles containing the stipulation just mentioned, brought an action for wages pro rata earned on board a vessel which was lost on her homeward voyage, after having earned freight both on the outward voyage and in some intermediate trips from one West India island to another: the Court held themselves bound by the express contract of the party, and that the seaman was precluded from recovering. In the latter case, the action was brought by the administrator of a deceased seaman, for one moiety of the share of a cargo of sperm oil, on articles of agreement whereby the deceased agreed to serve on board the ship *Royalist*, bound from London to the South Seas on a whaling adventure, and to return therewith to London, where the voyage was to end. The articles also contained the stipulation in question; viz. that no one of the crew should demand or be entitled to his share until the arrival of the ship at London. A cargo of oil was procured; but the ship was afterwards condemned in a foreign port, and the cargo transhipped and despatched in another vessel, on board which the seaman was returning home when he died. The case was much considered; and the Court decided that as the clause was clear and distinct, the plaintiff ought not to recover on the articles.

<sup>2</sup> The *Juliana*, 2 Dods. 504.

**Jackson**, where she delivered that cargo; and then sailed to **Batavia**, where she took in a cargo of poultry, which she partly delivered at **Minto**, and then sailed to **Singapore**, where she delivered the remainder, and took in sugar for **England** and various goods for **Calcutta**, at which place she discharged the latter goods and took in other articles for **England**. In the month of **December 1821**, (after an absence, therefore, of 16 months,) she arrived at the **Downs**, where, having struck on the **Kentish Rock**, she was wrecked and every soul on board perished, except **Lattimore** and another, who were picked up by a fishing-boat. It was admitted that freight to the amount of 3000*l.* at least had been earned, and that during the whole of these voyages the seaman well and ably performed his duty; but his claim for wages was met by alleging the stipulation in the articles which has been above set forth. Upon these facts, his Lordship rejected the allegation, and pronounced in favour of the poor mariner's claim: nor, however, as lawyers, we may dissent from the conclusion, is it possible, as men, to find fault with it.<sup>1</sup>

The remedy belonged of course to the legislature; and accordingly in the statute just passed it is, as we have seen, expressly declared, "that no clause in the agreement whereby a seaman shall consent to forego the right which the maritime law gives him to wages in the case of freight earned by ships subsequently lost, or containing any words to that effect, shall be valid or binding on any seaman signing the same."<sup>2</sup> Any such stipulation, therefore, as the one which we have been considering will henceforth be nugatory.

<sup>1</sup> In *Appleby v. Dods*, Lord Ellenborough expressed an opinion that the clause was a reasonable one as applied to West India voyages, "the reason being," as he said, "no doubt to oblige the mariners to return home with the ship, and not to desert her in the West Indies;" but his Lordship seems to have forgotten for the moment that desertion was punishable by the forfeiture of all the wages earned. The introduction of such a clause had been strongly reprobated by the Scotch Courts, and Mr. Bell seems to have considered that in the form above mentioned it would operate merely as a postponement of the time of payment, and not as a limitation of the right; but see the observations of Lord Lyndhurst, in *Jesse v. Roy*, (Com. ch. iv. sec. 1. §. 4.)

<sup>2</sup> S. 5. We have before stated our reasons for thinking this clause inapplicable to contracts for wages to be paid *by the voyage*.

II. For the time and mode of payment, provision is made by the legislature. By the new statute it is enacted,<sup>1</sup> that the master or owner shall pay to every seaman entering into such contract as aforesaid his wages, if the same shall be demanded, within the respective periods following; that is to say, if the ship shall be employed in trading coastwise, the wages shall be paid within two days after the termination of the agreement, or at the time when the seaman shall be discharged, whichever shall first happen, and in every other case the wages shall be paid at the latest within three days after the cargo shall have been delivered, or within ten days after the seaman's discharge, whichever shall first happen; in which two cases of delayed payment, the seaman shall, at the time of his discharge, be entitled to be paid on account one-fourth part of the estimated balance due to him; and if any master or owner shall neglect or refuse to make payment in the manner required, he shall for every such neglect or refusal forfeit to the seaman the amount of two days' pay for each day, not exceeding ten days, during which payment shall, without sufficient cause, be delayed beyond the period prescribed, for the recovery of which forfeiture the seaman shall have the same remedies as he is entitled to for the recovery of his wages. A proviso is added, that the clause is not to extend to the case of ships employed in the Southern whale fishery, or on voyages for which seamen, by the terms of their agreement, are compensated by shares in the profits

<sup>1</sup> S. 11. The former statutes on this subject were the 2 Geo. II., c. 36, s. 7, and 31 Geo. III., c. 39, s. 5. Policy, as well as the interest of the mariner himself, seems to require that the wages should not be payable till the completion of the service. The ordinances of some foreign countries on this subject are mentioned in Abbot on Shipping, 450. By most of these, a proportion of the wages is payable in foreign parts when freight has been earned by the vessel. By the law of America, as it is there stated, a seaman is entitled to receive one-third of his wages due to him at every port where the ship unloads and delivers her cargo before the voyage is ended, unless the contrary is expressly stipulated in the contract. The effect of the enactments in the text is to postpone, as we apprehend, the payment of the wages until the several periods therein mentioned, and to take away therefore from the seaman any right to claim part payment before these periods. If there be any doubt, however, on this point, it will be easy to introduce into the articles a stipulation, that, except in the cases otherwise provided for by the statute, the wages shall not be payable until the service shall be ended. Such a stipulation will be free from the objection made against the stipulation which has been so justly censured.

of the adventure. It is declared, moreover, that the payment shall be valid, notwithstanding any previous assignment by the seaman of his wages, or of any attachment or incumbrances thereon; and that no assignment of wages made prior to the earning of them shall be valid or binding upon the party making it.<sup>1</sup>

The delay thus allowed upon the termination of long voyages may prove injurious to a seaman as preventing him from entering immediately into another engagement. For such a case, therefore, the statute considerably provides, by enacting, that if a seaman, after having been discharged three days, shall be desirous of proceeding to sea on another voyage, and in order thereto shall require immediate payment of the wages due to him, it shall be lawful for any justice of the peace, on his application, and on satisfactory proof that he would by delay be prevented from employment, to summon the master or owner before him, and require cause to be shown why immediate payment of such wages should not be made; and if no satisfactory reason shall be assigned for further delay, such justice shall order payment to be made forthwith, in default of compliance with which order the master or owner shall forfeit the sum of five pounds.<sup>2</sup>

In the case of a seaman quitting the vessel to enter into the king's service, the statute directs<sup>3</sup> immediate delivery of

<sup>1</sup> S. 12.

<sup>2</sup> S. 14.

<sup>3</sup> S. 46. The section is as follows:—"And be it enacted, that when any seaman shall quit a merchant ship in order to enter into his majesty's naval service, and shall thereupon be actually received into such service, not having previously committed any act amounting to, and treated by the master as a total desertion, he shall be entitled, immediately upon such entry, to the delivery up of all his clothes and effects on board such merchant ship, and (in case the ship shall have earned freight) to receive from the master the payment of the proportionate amount of his wages up to the period of such entry, either in money, or by a bill on the owner thereof; all which clothes, effects, money and bill, such master is hereby required to deliver up to him accordingly, under a penalty of twenty-five pounds for any refusal or neglect, to be recovered, with full costs of suit, by such seaman: provided always, that if no freight shall have been earned at the time of such entry, then the master shall, and he is hereby required to give the seaman so entering a bill upon the owner for his wages to the period of such entry, payable on the ship's safe arrival at her destined port; but in case the master shall have no means of ascertaining the balance justly due, he shall make out and deliver a certificate of the period of his services, and the rate of wages he is entitled to, producing at the same time, to the commanding or other officer of his majesty's ship, the agreement entered into

all the seaman's effects on board, and (in case freight has been earned) payment of the proportionate amount of his wages up to the period of such entry, either in money or by a bill on the owner; if no freight has been earned, then the master is to give him a bill upon the owner for his wages to the time of entry, payable on the ship's safe arrival at her destined port, if the amount be ascertainable, and if not ascertainable, a certificate of the period of his services, and the rate of wages he is entitled to. The penalty on the master for non-compliance is no less than twenty-five pounds, to be recovered, with full costs of suit, by the seaman.

When a seaman is left on shore at any place abroad under a certificate of his inability, from sickness, to proceed on the voyage, the master is to deliver to the functionaries or merchants, by whom such certificate shall be given, a just and true account of the wages due, and to pay the same to the seaman either in money, or by a bill drawn upon the owner

with the seaman for the voyage; and every such master, upon the delivery up of such clothes and effects, and the settlement of such wages in manner herein mentioned, shall be entitled to receive from the officer in command of the ship of his majesty, into which such seaman shall have entered, a certificate signed by the said officer, which such officer is hereby required to give upon the request of the master, testifying that such seaman has entered into such ship of his majesty to serve, as proof that the master had not parted with the seaman contrary to the provisions of this act."

On this section it is necessary to make some observations. The intention, apparently, was to give the seaman his wages up to the time of quitting the vessel, but not, probably, to give him a bonus or advantage over the other seamen who remain. But the master is required to pay him, if freight have been earned, not only the wages earned in respect of that portion of the voyage upon which the freight has been earned, but also a further sum for his service up to the period of quitting, though possibly, by subsequent disaster, the freight of that part of the voyage may be lost, and all the other seamen be deprived of their wages in respect of it. Moreover, the master is required, if freight have been earned, to pay immediately wages *pro rata* to the time of quitting, though the seaman may have contracted not by the month, but by the voyage out and home, in which case the master will have no means of ascertaining the amount due—and this he is to do under a penalty of twenty-five pounds. The proviso as to delivering a certificate where the amount is not ascertainable, clearly applies only to the case where freight has not been earned, and the certificate itself is to express the rate of wages the seaman is entitled to, which cannot be done where the contract is for the voyage. Another objection to the section is, that, by the position of the clauses, it is questionable whether the penalty is not made applicable only to the first part, viz. the neglect or refusal to deliver the clothes and effects on board, and to pay the wages when *freight has been earned*; the refusal to give a bill or certificate when freight has not been earned, being left unprovided for.

of his ship; and if by bill, then such functionary or merchant is authorized and required, by certificate indorsed on the bill, to testify that it is drawn, according to the act, for money due on account of wages of a seaman, or to that effect; the penalty upon the master for a refusal or neglect to give such account and to pay the amount thereof, or for giving a false account, being also twenty-five pounds.<sup>1</sup>

Some provision likewise has been made, in case of the death of a seaman on the voyage, for the payment of his wages to his representatives or family. For by the stat. 4 & 5 W. IV. c. 52, s. 30,<sup>2</sup> it is enacted, that all sums of money which shall be due for wages to any seaman hired on board a British merchant in any port of Great Britain or Ireland, who shall have died on board during the voyage, shall, within three months after the arrival of the ship in any port of the United Kingdom, be paid to the trustees of the port to be appointed in pursuance of that act, or where no such trustee, to the receiver, collector, or other authorized agent of the president

<sup>1</sup> S. 44. This section seems to be still more liable to objection than the other. No provision is made for the case where the wages are in a course only of being earned (as where no freight has been earned by the vessel). In terms it is confined to wages *due* to the seaman; so that if none be *due* at the time, though in a course of becoming so, it will, as it seems, be inapplicable, and the benevolent intention of the legislature will not be fulfilled.

<sup>2</sup> The object of this statute is the establishing of a fund, under proper management and guardianship, for the relief and support of sick, maimed, disabled, and shipwrecked seamen, and of the widows and children of such as shall be killed or drowned in the merchant service. It is sufficiently remarkable, and serves to show how greatly some general system is wanted for the framing of acts of parliament, that the section above quoted is confined to the case of seamen hired in *some port of the United Kingdom*, and dying *on board* a British ship. No provision, therefore, of this kind, is made in the case of seamen hired beyond sea, or dying whilst the vessel is in a foreign port; whilst on the other hand, by a strange sort of perversity, the new stat. 5 & 6 Will. IV. c. 19, provides with great care and particularity for the disposal of the *effects* of British seamen dying abroad *elsewhere than on board a British ship*, but says not a word about payment of their wages. The money and effects, if within the limits of a British consulate, are to be taken charge of by the consul for the benefit of the next of kin of the deceased; and if no claim shall be made within three calendar months, are to be remitted, after deducting the expenses, to the president and governors of the society before-mentioned for the relief of merchant seamen, to be disposed of by them in the same manner as the wages of persons dying on board are directed to be by the relief act. If the effects be left on board, and be not claimed within one month after the ship's arrival, the master is then to deliver them to the officers of the same society for the same purpose. S. 25.



or governors [of the society to be incorporated under the act,] for the use of the executors or administrators of the deceased seaman; and in case no claim shall be made for such wages within one year afterwards, that then the trustees of the said port shall remit the amount to the collector, receiver, or other agent of the president and governors at the port of London, for the use of such executors or administrators; and if no claim shall be made within another year then following, that then the president and governors may direct such wages to be paid over (but without interest) to the widow, or, if there be no widow claiming, to the lawful issue, or such persons as would be entitled under the statute of distributions; and lastly, that if, after the lapse of a third year, still no claim be made, the money shall be applied in aid of the funds of the institution.

III. Of the remedies for the recovery of wages.—It is a rule of the maritime law universally received, that the wages of the seamen constitute a specific charge or lien on the ship itself; and this lien is not lost by the hypothecation of the vessel, nor even by the sale of it, unless made under the decree of a court of competent authority.<sup>1</sup> We have already seen that it continues even upon the materials rescued from the wreck by the exertions of the seamen. Where the value is insufficient to satisfy all the existing charges, wages are preferred before all, and must be paid in full, before other claims are admitted.<sup>2</sup> They constitute, moreover, a personal debt binding both the master and the owner, the former as the actually contracting party, the latter as the person for whose benefit the contract was made and the service performed. But, by the nature of their jurisdiction, the courts of common law in this country, though in strictness solely entitled to the cognizance of the contract, cannot directly enforce the remedy against the vessel itself. The Court of Admiralty, however, possesses and exercises this jurisdiction *in rem*, and hence it happens that suits for wages are for the most part brought before that tribunal. The foundation of the Admiralty jurisdiction is that the service, in respect of

<sup>1</sup> Sydney Cove, 2 Dods. 11; and see 1 Dods. 37.

<sup>2</sup> The Favourite, 2 Rob. 232. The same rule prevails in France, Code de Com. Art. 192.

which the claim arises, was performed upon the high seas. The *contract* is made in port, and when in an English port, of course within the limits of the general and *exclusive* jurisdiction of the Courts of Westminster Hall. The proceeding therefore in the Admiralty Court never, in the first instance, assumes the existence of a special agreement, but alleges merely the service actually performed. But by the common law, if, in the course of the suit, it should be made apparent that the right depended on the terms of a special contract executed in England, a prohibition might have issued from the Court of King's Bench to stop the proceedings before the inferior tribunal, and to bring the further cognizance of the case before itself. By this course, however, the lien upon the ship would virtually have been lost, and consequently, when the execution of a written agreement was made imperative by the statute, a clause was also introduced,<sup>1</sup> declaring that it should not have the effect of taking away this lien; and with the same view, and in like manner, it is provided by the recent consolidating statute,<sup>2</sup> "that no seaman, by entering into or signing such agreement as aforesaid, shall forfeit his lien upon the ship, nor be deprived of any remedy for the recovery of his wages which seamen are now lawfully entitled to against either the ship, the master, or the owners." The effect of the proviso so introduced, rather perhaps by the acquiescence of the courts of common law than by the operative force of the clause itself, was to leave to the Admiralty Court the undisturbed cognizance of claims for wages, even though the proceedings should disclose a written contract such as required by the legislature.<sup>3</sup> Still, with the ancient jealousy of encroachment, it was considered, and in some cases determined, that where the contract was not such as was contemplated by the statute, but was clothed with the solemnities of

<sup>1</sup> 2 Geo. II. c. 36, s. 8.

<sup>2</sup> S. 5.

<sup>3</sup> This jurisdiction of the Court of Admiralty is generally treated as a peculiar and excepted case, and ought perhaps to be so considered. There is no doubt that it was the convenience and efficiency of its mode of proceeding—by warrant to arrest the ship—which enabled it to retain the cognizance of these causes. It is singular, and an anomaly, that the master, though his engagement rests on exactly the same principles, has not been able to procure the same privilege, but is always remitted to a court of common law. The effect to him has been the loss of his lien on the ship. See *Day v. Serle*, Ab. on Sh. 481.

a deed, containing, moreover, peculiar and unusual stipulations, the consideration of such an instrument could not with propriety be permitted to the inferior court, and that a prohibition accordingly ought to issue.<sup>1</sup> At this day, however, covenants under seal, with the officers and seamen of a vessel, must be of very rare occurrence, and practically, therefore, it may be assumed that, in all cases of seamen's wages, the Court of Admiralty has jurisdiction.

The seaman, therefore, may proceed for the recovery of his wages either by a suit in that Court against the vessel, or the master and owner; or by an action in a Court of Common Law against the master or owner personally. In either case the action must be commenced within six years from the period at which the wages were payable,<sup>2</sup> unless the suitor were under some disability to prosecute his claim, as when absent beyond the seas, or the like, in which case the limitation will be reckoned from the time of the removal of the disability.

But in addition to these, which are the ordinary methods of proceeding, the statute, adopting a provision introduced by a former act,<sup>3</sup> gives a summary and less expensive mode of recovering wages where the amount does not exceed twenty pounds, enacting, that in such cases it shall be lawful for any justice of the peace residing near to the place where the ship shall have ended her voyage, cleared at the Custom House, or discharged her cargo, or near to the place of residence of the master or owner, upon complaint on oath by the seaman, or on his behalf, to summon the master or owner before him, and to examine *upon the oath of the parties*, and of their witnesses (if any), touching the complaint and the amount of wages due, and to make such order for payment as shall appear to him reasonable and just: and that in case such order shall not be obeyed within two days after the making, such justice may issue his warrant, levy the amount awarded, and all expenses, by distress

<sup>1</sup> Day v. Serle, Ab. on Sh. 481; Howe v. Nappier, 4 Burr. 1944; and see the whole matter very ably discussed in Ab. on Sh. 478, et seq.

<sup>2</sup> By the French law a suit against the ship *in specie* must be commenced within one year. Six years is an unreasonably long period, but practically a proceeding against the vessel at the end of that time would be of little use.

<sup>3</sup> 59 Geo. III. c. 58, s. 1.

and sale of the goods of the party upon whom the order shall have been made; and if sufficient distress cannot be found, may cause the amount to be levied on the ship and furniture, and if the ship be not within his jurisdiction, may cause the party upon whom the order was made to be apprehended and committed to gaol until the amount, with all costs, shall be paid; which award and decision is to be final and conclusive on both parties.<sup>1</sup> And in order to enforce the adoption, where applicable, of this less costly remedy, it is by a subsequent clause enacted, that if any suit for wages instituted in an Admiralty Court, or in any Court of Record in the British dominions, it shall appear to the judge that the plaintiff might have had an effectual remedy by the mode above prescribed, the judge is to certify accordingly, and thereupon no costs of suit are to be awarded to the plaintiff.

We have now completed the proposed inquiry into the relation of hired seamen to their employers, as regards, severally, the contract of hiring—the service—and the remuneration; but there is still another portion of the crew, which, however humble, must not be suffered to escape attention. By the 31st section of the statute, so often quoted, masters of vessels belonging to British subjects are required to have on board at the time of clearing outward one apprentice, or more, in proportion to the registered tonnage; that is, for every ship of eighty tons and under two hundred tons, one at the least; of two hundred and under four hundred tons, two at the least; of four hundred and under five hundred, three; of five hundred and under seven hundred, four; and of seven hundred and upwards, five; all of which apprentices at the period of their being bound respectively, shall have been under seventeen years of age, and shall have been bound for four years at the least. A penalty of ten pounds is imposed on the master for each apprentice deficient.<sup>2</sup>

By the 26th section power is given to the overseers and guardians of the poor of any parish, &c. in the United Kingdom, to bind by indenture and put out any boy of pauper parents, having attained the age of thirteen years, and

<sup>1</sup> S. 15. In the former act an appeal was allowed to the Court of Admiralty.

<sup>2</sup> The object being the *training* of a certain number of persons to the sea service.

being of sufficient health and strength, with his own consent, but not otherwise, an apprentice in the sea service to any master or owner of a British registered ship, until he shall have attained the age of twenty-one years. Careful provision, however, is made against the abuse of this power, by requiring the previous assent of two justices of the peace, who are to satisfy themselves of the boy's fitness for the service. And "to the end that the period when the service under such indenture shall expire may the more certainly appear," the age of the boy is to be inserted in the indenture, taken from the parish register, or where no entry is to be found, from the best information which the justices can obtain; and the age so inserted is to be taken as the true age. Parish apprentices bound to service on shore may also, with their own consent and the concurrence of their master or his representatives, be assigned over to the sea service for the residue of their term.<sup>1</sup> And upon the death of the master of any parish apprentice to the sea service, his widow or representatives may assign the indenture to some other master or owner of a ship.<sup>2</sup> Any master who after the ship shall have cleared outwards shall suffer his apprentice to quit his service, (not entering into that of his Majesty,) except in case of death, desertion, sickness, or other unavoidable cause, to be certified in the log-book of the ship, incurs a penalty for every such offence of ten pounds.<sup>3</sup> Nor is any parish or voluntary apprentice to the sea service to be at liberty to enter into the king's naval service during the period of his apprenticeship, without the consent of his master; but if he do so enter, and be permitted by his master to remain, the master, in case he shall give notice of his consent to the secretary of the Admiralty, will be entitled to receive the wages earned by the apprentice up to the period of the expiration of his indenture.<sup>4</sup> All claims of apprentices upon their masters under their indentures, and all complaints of hard or ill-usage exercised by the master towards the apprentice, or of misbehaviour of the apprentice, may be examined and determined by any two justices of the peace residing at or near any port at which the ship may arrive,

<sup>1</sup> S. 27.<sup>2</sup> S. 28.<sup>3</sup> S. 36.<sup>4</sup> S. 39.

who may make such orders therein as they are empowered to do in other cases between masters and apprentices.<sup>1</sup> In all other respects apprentices to the sea-service as regards their rights and obligations differ in no respect from apprentices on shore, the terms and conditions of their service being embodied in the indentures by which the relation is created.

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The excellent statute which we have been so long considering contains other regulations which, though most of them positive ordinances for purposes of public policy, and connected rather with the duty of the master than with the subject immediately before, are yet of sufficient importance to justify a brief notice of them here. One principal object of the act was the establishment of a register of seamen; and accordingly by the 19th section it is enacted, that there shall be established in the port of London an office to be called "The General Register Office of Merchant Seamen," to consist of a registrar and clerks, under the direction and control of the Board of Admiralty. By the Merchant Seamen's Relief Act, 4 & 5 Will. IV. c. 52, s. 9, the master was required to keep a book by way of muster-roll or account of the ship's company, signed by himself, containing an entry of the name, age, place of birth, and quality of every officer or seaman on board, with other particulars specified in a Schedule to the Act, as the time and place of entry, particulars of seamen received in the course of the voyage, of desertions, discharges, and deaths, of casualties on board, and a statement of the clothes and effects left by or the wages owing to any seamen who might have died on board. The 21st section of the new act, reciting this clause, requires the master of every ship trading to parts beyond the seas, not only to keep the book and muster-roll therein mentioned, but also, on reporting the ship on her arrival at the port of destination in the United Kingdom, to deliver to the collector or comptroller of the Customs at such port an account, signed by himself, of all the seamen and others, including apprentices, who shall have belonged to the ship at any time during her absence from the United Kingdom; which account is to contain a correct return, under their respective heads, of the following particulars as applicable to each seaman: viz. the name, age, place of birth, quality, ship in which he last served, date of joining the ship, place where, time of death or leaving the ship, place where, and how disposed of.<sup>2</sup> The masters of vessels em-

<sup>1</sup> S. 37.

<sup>2</sup> The form is given in Schedule C. of the Act.

ployed in the coasting trade or in the fisheries on the coast, are to make a similar return to be deposited in like manner; but containing in addition an account of the several voyages in which the ship shall have been engaged during the preceding half-year.<sup>1</sup> In case of the loss of a ship or sale abroad a like return is to be made out as soon as possible after the loss, and within twelve calendar months at farthest after the sale of the ship, either by the master or owner, and to be delivered or transmitted to the registrar in the port of London.<sup>2</sup> The returns so deposited with the collector or comptroller of the customs are to be by them transmitted from time to time to the registrar, and the neglect or refusal of the owner or master to make the return is punishable by a penalty of 25*l*.<sup>3</sup> From the lists so returned the register will be compiled. Indentures of apprenticeship and assignments are also to be entered in a book—in London, by the registrar—and in each other port, by the collector and comptroller of the customs, who are to transmit quarterly lists to the registrar:<sup>4</sup> and for the neglect to cause an indenture or assignment to be so registered, a penalty is imposed upon the master of 10*l*. for each offence.<sup>5</sup> Power also is given to the registrar and his assistants, and to the collectors and other chief officers of the customs at the several ports of the United Kingdom, to demand from the master the production of the muster-roll, and of the ship's articles, with liberty to take a copy of either or both, and to muster the crew and apprentices of the ship, for the purpose of ascertaining whether the provisions of the act and of the laws relating to navigation have been complied with: the neglect or refusal of the master in any of these particulars being punishable by a penalty of 50*l*.<sup>6</sup> A like power in all respects is given to the captain, commander, or other commissioned officer of any of his Majesty's ships, the penalty upon the master for refusal or neglect in that case being 25*l*.<sup>7</sup> The humane provisions of the statute in the case of seamen left ashore in foreign parts have been already adverted to. A clause,<sup>8</sup> moreover, is introduced into the new statute, whereby, when a ship be sold in any foreign port, except in case of wreck and condemnation, the master is required (unless the crew in the presence of the British consul or vice-consul, or, where no such functionary, in the presence of one or more resident British merchants, shall signify their consent to be there discharged), besides paying them the wages to which they shall be entitled, either to

<sup>1</sup> S. 22, according to a form in Schedule D.

<sup>3</sup> S. 24.

<sup>6</sup> S. 51.

<sup>4</sup> S. 33, 34.

<sup>7</sup> S. 52.

<sup>2</sup> S. 23.

<sup>5</sup> S. 35.

<sup>8</sup> S. 17.

provide them with adequate employment on board some other British vessel homeward bound, or to furnish the means of sending them back to the port of his Majesty's dominions at which they were originally shipped, or to some port in the United Kingdom, as shall be agreed upon, by providing them with a passage home, or depositing with the consul or vice-consul such a sum of money as he shall deem sufficient to pay the expenses of their subsistence and passage; and if the master shall neglect or refuse so to do, the expenses when defrayed shall be a charge upon the owner, except in cases of barratry, wreck, or condemnation, and may be recovered against him as money paid and expended on his account, with full costs, at the suit of the consul by whom the expenses were defrayed, or of his Majesty's attorney-general, in case they shall have been allowed to the consul out of the public monies. By a former statute, (11 Geo. IV. and 1 Wm. IV. c. 20, s. 82,) provision is made for "seafaring men and boys, subjects of the United Kingdom, who shall by shipwreck, or by any other means, or from any cause whatever, be driven or cast away, or left, or be in distress at any place in foreign parts;" the governors, ministers, consuls, and other officers of his Majesty, or, if none such, any two British merchants resident in the place, being authorized and required to provide for and subsist them, (an allowance being made for such subsistence on the production of proper vouchers by the Board of Admiralty,) and to put them on board the first or any ship bound for the United Kingdom which shall be in want of men; or, if no ship in want of men, then on board any ship bound for the United Kingdom, in the proportion not exceeding four for every hundred tons burden; the master of which ship is bound to receive, subsist, and give a passage to them accordingly, under a penalty of 100*l.* for each man or boy, being entitled to receive an allowance for the number so received beyond the complement of his ship from the Lords Commissioners of the Admiralty. By the present statute power is given to his Majesty to recover by suit in his Exchequer from the master or owner of any vessel, the master of which shall have forced on shore or left behind any person against the provisions of the act, in addition to the wages due from and penalties imposed upon such master, all the charges and expenses which shall have been incurred in the subsistence and conveyance home of such person, together with full costs of suit.<sup>1</sup>

<sup>1</sup> S. 47.

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ART. IV.—ON AN ACT OF BANKRUPTCY BY A FRAUDULENT  
TRANSFER OF GOODS, AND ON FRAUDULENT PREFERENCE  
IN BANKRUPTCY.

"ANY trader making any fraudulent gift, delivery, or transfer of any of his goods or chattels with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy."<sup>1</sup> Our readers are aware that this provision is now introduced for the first time into the system of our Bankrupt Laws; and our present object is to ascertain *when* a gift, delivery, or transfer by a trader of any of his goods or chattels is within its meaning an act of bankruptcy; the test which the words afford is, that it must be fraudulent and with intent to defeat or delay his creditors. We are fortunately not without a guide in this matter, for an act of bankruptcy in one of the repealed statutes<sup>2</sup> was, any fraudulent *grant* or *conveyance* by a trader of his lands, tenements, goods, or chattels, to the intent or whereby his creditors should or might be defeated or delayed for the recovery of his debts. The courts decided that the act of bankruptcy was not effected without a *deed*; and the principal object of the new provision seems to be, that *any* transfer by a trader of his goods should have the same effect. The decisions then under the old law may be safely referred to, to ascertain when transfers without any deed or writing are deemed by the legislature fraudulent, and made with an intent to defeat or delay creditors.

Slader, a miller, in embarrassed circumstances, about three weeks before he committed an act of bankruptcy, assigned his message, mill, *and all his stock in trade* to a banker, to secure advances *to be made*.<sup>3</sup> The question was, whether this assignment was an act of bankruptcy. Lord Mansfield said, "the consideration of the deed I allow to be a good, valuable, and true consideration; and I allow this deed to be a valid transaction as between the parties. But valid transactions as between the parties may be fraudulent by reason of covin, collusion, or confederacy to injure a third person. The end

<sup>1</sup> 6 Geo. IV. c. 16, s. 3.

<sup>2</sup> 1 Jac. I. c. 15, s. 2.

<sup>3</sup> Worsely v. De Mattos, 1 Burr. 467. A.D. 1758.

proposed was, that in case Slader should become bankrupt, his whole estate should first be vested in the banker for payment of what was justly due to him. The preference aimed at was fraudulent and unlawful: such preference is a fraud upon the whole bankrupt law, and would defeat the two main objects it has in view; to wit, the management of the bankrupt's estate, and an equal distribution among his creditors."

One Lawson, a trader, just before committing an act of bankruptcy, assigned all his estate and effects whatsoever to a creditor to secure *a debt actually due*.<sup>1</sup> It was held, that this deed was an act of bankruptcy. Lord Mansfield observed, "it is not necessary that the deed should be fraudulent as between the parties; nor is this deed at all so, for it is a very fair deed as to the parties; but it is made to prefer this creditor to the bankrupt's other creditors. It defeats the whole Bankrupt Law."

In a case<sup>2</sup> in which a trader had indorsed a bill of exchange to a creditor just before bankruptcy, Lord Mansfield said, "all acts to defraud creditors or the public laws of the land are void; and if the nature of the act be a conveyance or grant, it is not only void, but an act of bankruptcy. It has been determined that a conveyance by a trader of all his effects for the payment of one or more bona fide creditors of the most meritorious kind is void, because it is not an act in the ordinary course of business; it is not such an act as a man could do, but it must be followed by an immediate act of bankruptcy; and it is defeating the equality that is introduced by the statutes of bankruptcy."

A trader on the eve of bankruptcy made a bill of sale of all his goods and effects whatsoever to secure a previous debt and a further advance.<sup>3</sup> Lord Mansfield:—"this is a stronger case than any of the former: the bill of sale was a fraud on all the Bankrupt Laws. It was a conveyance of all he had in the world. He must have had the act of bankruptcy, which he committed in twenty-four hours afterwards, in contemplation at the time."

It is plain from these cases that Lord Mansfield considered

<sup>1</sup> *Wilson v. Day*, 2 Burr. 927. A. D. 1759.

<sup>2</sup> *Alderson v. Temple*, 4 Burr. 2235. A. D. 1768.

<sup>3</sup> *Butcher v. Easto*, Doug. 294. A. D. 1779.

the fraud which constituted a deed an act of bankruptcy to consist in an intention to defeat the objects of the Bankrupt Laws, by withdrawing the bulk of a trader's property from their operation; it is necessary therefore that such a deed should be executed in contemplation of bankruptcy; and whether it is so is a question of law; it is the judgment of law upon facts and intents.<sup>1</sup> If bankruptcy almost inevitably follows the completion of a conveyance by a trader, that is deemed sufficient, for a man must be taken to contemplate the probable consequences of his acts.<sup>2</sup> If the deed embrace all or nearly all the trader's property, it is quite immaterial whether it is to secure a previous debt, or an advance made at the time; or whether it is made at the instance of the creditor, or to avoid an arrest or not.<sup>3</sup>

And this is the view which has been taken of the subject ever since, as is obvious from that numerous class of cases which decide that an assignment by a trader of all his estate is only fraudulent as to those creditors who do not execute or assent to it. "To constitute this act of bankruptcy, the trader must make, or cause to be made, a fraudulent grant or conveyance of his lands, tenements, goods, or chattels, with intent to defeat or delay his creditors. But the law says the deed cannot be considered fraudulent as to those who are privy and assent to it. A creditor who feels himself aggrieved, and thinks that he shall be defeated or delayed, may sue out a commission, and rely upon the deed as the act of bankruptcy. But in *Bamford v. Baron*, the principle was laid down, that those who have assented to the deed cannot afterwards set it up as fraudulent. If the deed be not fraudulent, the execution of it is no act of bankruptcy."<sup>4</sup>

"If this deed be an act of bankruptcy, it is upon the ground of fraud only, in the sense in which it is used in the acts of parliament, as a conveyance for the purpose of giving a fraudulent preference to a particular creditor. By fraudulent, I mean a security contrary to the policy of the Bankrupt Laws, which are intended to secure to the general creditors an equal division of a bankrupt's estate."<sup>5</sup>

<sup>1</sup> 1 Burr. 474.

<sup>2</sup> *Robertson v. Liddell*, 9 East, 487; *Stewart v. Moody*, 1 Cro., Mee & Ros. 777.

<sup>3</sup> *Butcher v. Easto*, Doug. 294; *Newton v. Chandler*, 7 East, 138.

<sup>4</sup> *Verba Gibbs, C. J. in Back v. Gooch*, 4 Camp. 232. See 1 Moo. & Mal. 141.

<sup>5</sup> *Verba Alexander, C. B. in Balme v. Hutton*, 2 You. & Jer. 109.

We have now clearly ascertained the nature of the fraud which constitutes an act of bankruptcy. We proceed to enquire what are the criteria of the existence of this fraud.

If an insolvent trader assign all his effects for the benefit of one or more creditors, to the exclusion of the rest, the law says his fraudulent intention is manifest, for he necessarily defeats the object of the Bankrupt Laws, and deprives a portion of his creditors of their just rights. So, if he assign all with a colourable exception of a small part. The following are cases in which the assignment has been deemed equivalent to an assignment of all the trader's estate:—

“All his effects, goods, stock in trade, and book debts, except household goods, watches, plate, bills of exchange, inland bills, promissory notes, and cash then by him.”<sup>1</sup> All the trader's goods and stock in trade, some few particulars excepted, to the amount of about 100*l*.<sup>2</sup> Two leasehold messuages and all the assignor's stock in trade; the deed does not appear to have contained any exception, but it is stated that this was all the property of the assignor, except his household furniture and debts, which were trifling.<sup>3</sup> De Grey C. J. observed, “the question here turns upon this, whether the deed [a mortgage it would seem for money lent at the time] does not *ipso facto* create an insolvency in the trader; if so, it is clearly an act of bankruptcy, and void against creditors; and I think it creates an insolvency. It is an assignment of *all* his stock in trade, without which he can carry on no business. It is of all his substance, except his household goods and debts, which alone were insufficient to discharge his incumbrances, and therefore made him insolvent.”—If an assignment be of certain specified articles, it may be shown by parol evidence that the deed comprehends all the property of the trader, or all but a small part.<sup>4</sup> It may be stated as the main criterion whether an assignment be fraudulent on this ground or not,—does it *ipso facto* prevent the assignor continuing to carry on his trade?

But it was held under the statute of James that a trader

<sup>1</sup> Gayner's case, cited 1 Burr. 477, A. D. 1755, before Lord Hardwicke.

<sup>2</sup> Compton v. Bedford, 1 W. Bl. 362, A. D. 1762, before Lord Mansfield.

<sup>3</sup> Law v. Skinner, 2 W. Bl. 996, A. D. 1775, before De Grey, C. J.

<sup>4</sup> See Balme v. Hutton, 2 You. & J. 108.

might commit an act of bankruptcy by the assignment of *part* of his effects. But "there is a great difference between the conveyance of *all* and of a *part*. A conveyance of a *part* may be public, fair, and honest; as a trader may sell, so he may openly transfer many kinds of property by way of security. But a conveyance of *all*, must either be fraudulently kept secret, or produce an immediate absolute bankruptcy."<sup>1</sup> So, Mr. Baron Hullock observed, "I know of no case where a conveyance of part of a man's property is *per se* an act of bankruptcy."<sup>2</sup> Hence, then, an assignment of *all* in favour of one or a few creditors is necessarily fraudulent, for the assignor must have contemplated bankruptcy, and intended a preference: but an assignment of *part* may or may not be fraudulent. It is not fraudulent if the assignor either did not contemplate bankruptcy, or was not induced to make it by a desire to give a preference. It is fraudulent if the assignor contemplated bankruptcy, *and* was induced to make it by a desire to give a preference.<sup>3</sup> If a trader on the eve of bankruptcy voluntarily make an assignment in favour of a creditor, the presumption immediately arises that he contemplated bankruptcy, and was moved by a fraudulent intention to give a preference. But although a trader may see that bankruptcy is probable, yet his inducement to give a security to a creditor may not be a desire of preferring him.

In all the cases in which it has been held that an assignment by a trader of part of his effects was an act of bankruptcy, it appears that he at the time contemplated bankruptcy, and intended a preference.<sup>4</sup> Indeed, these two facts are so intimately connected, that, in many cases, if the latter be proved, the former may be almost assumed. If a trader in doubtful or hazardous circumstances officiously give a security to a creditor, it is pretty clear that he contemplated a bankruptcy, and sought to protect his friend from the consequences. In *Pulling v. Tucker*,<sup>5</sup> indeed, Abbott C. J. intimated an opinion that the contemplation of bankruptcy

<sup>1</sup> Verba Lord Mansfield, 1 Burr. 478.

<sup>2</sup> 2 You. & J. 108.

<sup>3</sup> *Belcher v. Prittie*, 10 Bing. 408, see p. 415; *Carr v. Burdiss*, 1 C. M. & R. 443.

<sup>4</sup> *Linton v. Bartlet*, 3 Wils. 47, A. D. 1770, coram Wilmot, C. J. See observations on this case, Cowp. 120, 124, 632, 633; 2 W. Bl. 997; 3 Taunt. 243. Note—the loan in that case was a previous loan. *Devon v. Watts*, 1 Doug. 86. *Whitwell v. Thompson*, 1 Esp. 68. *Morgan v. Horseman*, 3 Taunt. 241.

<sup>5</sup> 4 Barn. & Ald. 384.

was not a necessary ingredient, but did not decide the point; and his lordship's assumption was not in accordance with the recent cases.<sup>1</sup>

We may note it here, that though the point has been contested, yet it seems now settled, that a conveyance by a trader insolvent, or even "overwhelmed with debt," of part of his property, for the mere purpose of converting it into money, is not an act of bankruptcy.<sup>2</sup> Neither is the *bonâ fide sale* by him even of *all* his property—though he intend to abscond with the money, and cheat his creditors—an act of bankruptcy, if the purchaser be ignorant of that intention.<sup>3</sup>

It has been decided that a mortgage or security given by a trader, which includes only part of his goods, is not fraudulent, if it be not in contemplation of bankruptcy.<sup>4</sup> So if the trader were not moved to make it by a desire to give a preference.<sup>5</sup> So no case has decided that an assignment by a trader of part of his effects to secure money advanced at the time is an act of bankruptcy, for the motive could not be to give a preference. Lord Kenyon said, "that all the cases, without a single exception, where the assignment of his property by a trader had been deemed fraudulent and an act of bankruptcy, had been where it had been given for a by-gone and before-contracted debt; but that it never could be taken to be law, that a trader could not sell his property when his affairs became embarrassed, or assign them to a person who would assist him in his difficulties, as a security for any advances such person might make to him."<sup>6</sup>

But we must not conclude from these observations by Lord Kenyon, which are correct when considered with reference to the facts before him, that a mortgage by a trader, though to secure money advanced at the time, or future advances, *may* not be deemed fraudulent and an act of bankruptcy. It is true that such a mortgage, if it comprise only part of the trader's property, is *primâ facie* valid, and could not be impeached, unless perhaps the mortgagee were privy and con-

<sup>1</sup> See *Belcher v. Prittie*, 10 Bing. 408.

<sup>2</sup> *Barney v. Davidson*, 1 Brod. & Bing. 409. S. C. 4 Moore, 126, 322. *Robinson v. Carrington*, 1 Mont. & Ayr. 1.

<sup>3</sup> *Baxter v. Pritchard*, 1 Ad. & Ell. 456; *Rose v. Haycock*, ib. 460.

<sup>4</sup> *Jacob v. Shepherd*, cited 1 Burr. 478. *Unwin v. Oliver*, cited ibid. 481.

<sup>5</sup> *Morgan v. Horseman*, 3 Taunt. 241. See *Shaw v. Jakeman*, 4 East, 201.

<sup>6</sup> 1 Esp. 72.

sending to such an appropriation by the trader of the money advanced as would be grossly fraudulent with regard to his creditors generally. Suppose a trader to be in embarrassed circumstances, and to intend a speedy departure from England for the purpose of avoiding his creditors, we do not think a person with notice of such facts could safely lend him money, though the mortgage comprised only a part of his effects, and were unimpeachable upon the face of it. At any rate, it is proved by the cases of *Worseley v. De Mattos*,<sup>1</sup> and *Law v. Skinner*,<sup>2</sup> both of high authority, that mortgages by insolvent traders, comprising all, or nearly all, their property, though for money advanced at the time, cannot be sustained; and we think the principle of these decisions is undoubtedly correct and sound. Generally speaking, the effect of such a mortgage is merely to enable the trader, with the appearance of property, to struggle on a little longer, to give fraudulent preferences with the greater facility, to contract fresh debts, and to make provision against his impending failure. Most assuredly, before a lender relies upon a security embracing the stock in trade and nearly all the property of the borrower, he should be satisfied that bankruptcy or insolvency is not impending. The children of this world are wise in their generation; dig they cannot; to beg they are ashamed. So subtle are their contrivances, and so excellent the machinery, that what by means of mortgages and renewed bills, our traders flourish till the very eve of bankruptcy, and their astonished creditors find nothing but their furniture, a decent residue of their plate, their clothes, and watches!

We may now safely conclude, that any gift, delivery, or transfer by a trader of his goods or chattels, which would under the statute of James have been deemed fraudulent and an act of bankruptcy, if perfected or accompanied by a deed, will now be an act of bankruptcy, though there be no deed. But we must advance further, and say that every gift, delivery, or transfer by a trader of his goods or chattels, without a deed, which would before the present act have been deemed fraudulent, because it was a *preference*, must also now be accounted fraudulent, and consequently an act of bankruptcy. This introduces us to the somewhat famous doctrine of fraudulent preference in bankruptcy, to which we have indeed

<sup>1</sup> 1 Burr. 467.

<sup>2</sup> 2 W. Bl. 996.

already alluded in considering the nature of an assignment by deed by a trader of part of his effects: but we propose now to examine the cases more minutely, so as to arrive, if possible, at some certainty as to what facts are, in the judgment of the law, sufficient to authorise us to conclude that the motive which influenced a trader in making a transfer of goods was the preferring of one or more creditors to the rest. It is in the breast of the bankrupt, in the fact that determines his will, that the fraud originates and exists. It is not fraudulent in a creditor to receive payment of a just debt, though he may know that the estate of the debtor is insufficient to satisfy all demands upon it; he has a just demand, and it was not by his contrivance or inducement that the other creditors gave credit to the insolvent: he may, therefore, save himself, though he may perceive that many will be losers, and the greater losers by reason of the indemnity he obtains. Lord Chief Justice Tindal has observed—"I agree that the whole doctrine of fraudulent preference has arisen rather by the contrivance of courts of law than on the language of the Bankrupt Acts. Lord Mansfield held, that a transfer of bills made in contemplation of bankruptcy, and with a view to prefer a particular creditor, was void; because the trader 'cannot take his estate out of that management which the law puts it into,' and 'do an act of fraud, contrary to the spirit of the Bankrupt Laws, and to the injury of his creditors.' And Lord Eldon once stated, in the House of Lords, that this was a bold doctrine when first started, and in some degree a fraud on the act of parliament; because, if the act were insufficient in that respect, recourse should have been had to the legislature; but that after a course of decisions for fifty years, it was too late to alter the rule."<sup>1</sup>

The object of the Bankrupt Laws is that the whole of a bankrupt's estate should be divided amongst all his creditors *pari passu*, in proportion to their respective debts. Now it was forced on the attention of the courts, that this object was oftentimes defeated by the contrivances of insolvent traders; and to prevent this fraud on the laws, they established the rule, which we will give in the words of Mr. Justice Chambre, that "any payment made by a trader before an act of bankruptcy, and in contemplation of such act, and with a view on

<sup>1</sup> 7 Bing. 443, in *Cook v. Rogers*.



his part to give a preference to a particular creditor, is void."<sup>1</sup> And we confess we do not comprehend how this rule, which has certainly served to advance and protect the object of the Bankrupt Laws, deserves the description of it by Lord Eldon, of being a fraud on those laws. It was certainly a strong assertion by the courts that the act of the legislature was incomplete.

It is curious and instructive to mark the rise of this doctrine; and though, perhaps, it was first introduced by Lord Mansfield, as it was certainly firmly established by several of his luminous decisions, the following case at Nisi Prius, at the London Sittings, 1763, proves that he did not immediately assent to it.

One Hooper, a tradesman in London, was *bonâ fide* indebted to his mother to the amount of £800. His circumstances declining, he, on Monday, at eight o'clock in the morning, assigned to his mother a parcel of silks, amounting in value to about half of his stock in trade, and made out a bill of parcels, with a receipt, and a discount as for prompt payment, as if sold to her in the ordinary course of business. These were conveyed the same morning in a hackney-coach to the mother's lodgings in Hackney. In the evening he had a meeting of his principal creditors, when it was agreed he should commit an act of bankruptcy. The assignees under the commission got possession of these goods by a stratagem, upon which Mrs. Hooper brought trover against the assignees. It was objected, on the part of the defendants, that this was a fraudulent assignment, under the colour of a sale, transacted in direct contemplation of Hooper's becoming a bankrupt, and therefore void. Lord Mansfield observed—"The rule of law is clear and established. If a man, not having previously committed any act of bankruptcy, in order even to pay a just debt, assigns all his effects to the creditor, or all but some colourable part; or all to several creditors, but in total exclusion of any one or more of them, this in itself would make him a bankrupt; it would be the very act of bankruptcy. But a preference to one creditor, especially by assigning only part of his goods, and to pay only part of the debt, has been frequently held to be good, particularly in Cock and Goodfellow

<sup>1</sup> 2 Bos. & P., in *Hartshorn v. Slodden*.

(the case of a parent and child), Small and Oudly, and others. Indeed, if a man makes over so much of his stock in trade as to disable himself from being a trader, this would be fraudulent; it would be, as I said in *Compton and Bedford*, an assignment of his solvency. An assignment of his household goods would be the same, for a man cannot go on without them. But is half such a part of a man's stock as must necessarily have this effect? This would be going beyond any case that has yet been determined. Suppose he had sold the goods in question to John or Thomas, and with that ready money had paid his mother part of her debt; would that sale or payment have been void?"<sup>1</sup>

The next reported case occurs five years later, in 1768. A trader, on the 7th of November, indorsed and sent by the post a bill of exchange to Temple, a creditor to a large amount. The trader was a bankrupt on the 8th of November, and it was clear that the bill was sent in contemplation of the act. The assignees brought trover for the note, and the first count stated that they, as assignees, on the 7th of November were possessed of a promissory note, (describing it,) which note was accidentally lost, and came to the hands of the defendant, Temple, and he converted it to his own use. Lord Mansfield stated the question to be, whether, under the circumstances of the case, the indorsing and sending of the note was fraudulent, and void as such. He observed—"It is certain that the statutes of bankruptcy leave a trader, to the moment of an act of bankruptcy committed, every power an owner can have over his estate. The statute says, fraudulent *conveyances* shall be an act of bankruptcy. Other acts that are fraudulent are not made acts of bankruptcy, but they are attended with the consequences of fraud at law, which is, that fraud renders *every* act void. All acts to defraud creditors, or the public laws of the land, are void." His lordship shews in the sequel when the payment of a creditor is fraudulent, and what is the nature of the fraud, and the criteria of it. "A general question has been started, 'whether in any case, upon the eve of a bankruptcy, a man may do that which *in consequence* prefers a particular creditor;' and that has been argued as a general question. But that will depend upon the act. As if a bank-

<sup>1</sup> *Hooper v. Smith*, 1 W. Bl. 441.

rupt in course of payment pays a creditor, this is a fair advantage in the course of trade; or if a creditor threatens legal diligence, and there is no collusion, or begins to sue a debtor, and he makes an assignment of part of his goods, it is a fair transaction, and what a man might do without having any bankruptcy in view. But it never entered into the mind of any judge to say, 'that a man in contemplation of an act of bankruptcy could sit down and dispose of all his effects to the use of different creditors,' for that would be a fraud upon the acts of bankruptcy. But if done in a course of trade, and not fraudulent, it may be supported. This was not done in a course of trade, for there never was any dealing between the parties in sending indorsed notes. There was no application made by the defendant."<sup>1</sup>

In *Harman v. Fisher*,<sup>2</sup> in 1774, Lord Mansfield again clearly states what he considered sufficient evidence that the motive of a trader in making a payment was to give a preference. "A trader, at five o'clock in the morning, just going to commit an act of bankruptcy, orders his servant to take certain bills to a creditor in discharge of a debt; pursuant to no contract, in performance of no obligation, in no course of dealing, without the privity of the creditor, or call on his part for the money, and without a possibility of the notes being delivered before an act of bankruptcy was committed." He observed, in the same case, "Where an act is done that is right to be done, and the single motive is not to give an unjust preference, the creditor will have a preference."

Again, in *Rust v. Cooper*,<sup>3</sup> in 1777, his lordship said—"If in a fair course of business a man pays a creditor, who comes to be paid, notwithstanding the debtor's knowledge of his own affairs, or his intention to break, yet, being a fair transaction in the course of business, the payment is good, for the preference is there got *consequently*, not by design. It is not the object, but the preference is obtained in consequence of the payment being made at the time. Suppose a creditor presses his debtor for payment, and the debtor makes a mortgage of his goods and delivers possession, that is, and at any time may be, a transaction in the common course of business, without the creditor's knowing there is any act of bankruptcy in

<sup>1</sup> *Alderson v. Temple*, 4 Burr. 2235.<sup>2</sup> Cowp. 117.<sup>3</sup> *Ibid.* 629.

contemplation, and therefore good. *It is not to be affected by what passes in the mind of the bankrupt.*" By these words, which we have marked by italics, it is plain Lord Mansfield merely meant to allude to the knowledge which the bankrupt himself might have of the state of his affairs.<sup>1</sup> If a payment be made in a fair course of business to a creditor *because* he applies for it, it certainly cannot be deemed a fraudulent preference. In such a case a debtor is moved, not by favour or partiality, but by the application, and the probable consequences of refusing such an application, to make the payment. But his lordship seems to have intimated that it is material that a creditor who obtains payment by pressing for it, does not know that an act of bankruptcy is contemplated. This, in our opinion, is not important. If a payment by an insolvent can be avoided on the ground of fraudulent preference, the fraud arises from the knowledge and motives of the debtor, and *not* from those of the creditor. This was strongly shown by a case at the Northumberland Summer Assizes, 1831. A creditor hearing that his debtor had converted all his property into cash, and intended to escape to America, apprehended him when in a boat on his way to the vessel, and brought him on shore. The arrest was not a legal one, and the debtor at first refused to pay the debt, and threatened to bring an action for the false imprisonment; but finding that his escape would be frustrated if he persevered, he paid the creditor in full the next morning, and overtook the ship. A commission of bankrupt was sued out, and the assignees brought an action against the creditor for the sum paid him as above-mentioned. But Mr. Justice James Parke directed the plaintiff to be nonsuited, on the ground that the defendant had not notice at the time of the payment of an act of bankruptcy committed.<sup>2</sup>

If, then, a transfer of goods be made to a creditor by an insolvent trader, the facts and circumstances of the case must be enquired into to ascertain what *induced the trader* to make the transfer.

If a transfer by a trader be of all his goods, or all except a small part, in favour of one or a select number of his creditors,

<sup>1</sup> See a similar expression by Lord Alvanley, C. J. in *Hartshorn v. Slodden*, 2 Bos. & P. 585.

<sup>2</sup> *Martinez, Assignee of Searl, v. Campbell*, MS.

the nature of the transfer alone is conclusive that a preference was intended; for he must have known that a bankruptcy would inevitably and immediately follow. And suppose such a transfer were preceded by threats of legal process, how could they operate upon the mind of the trader so as to induce him to make it? If a transfer by a trader precipitates instead of averting his impending ruin, if it decides instead of postponing his fate, if it saves him from no inconvenience or disgrace, the law concludes, whatever may be the importunity of the creditor, that it was not made for the trader's own sake, but to effect that preference which it necessarily does effect.<sup>1</sup>

If a transfer be of part only of a trader's stock, of course the same conclusion does not arise as if it is of the whole, and the law then looks to the circumstances to ascertain the motives of the trader.

If a creditor institutes legal process, or threatens it, or merely makes an application, this raises the presumption that a preference was not intended, and if it be not rebutted by contrary facts, it is enough. It is enough, though the demand be upon a bond given to secure a previous debt, but which bond is not actually payable.<sup>2</sup> It is enough, though the creditor has reason to believe that the debtor is in bad circumstances,<sup>3</sup> and contemplating the commission of an act of bankruptcy.<sup>4</sup>

In the case of *Cook v. Rogers*,<sup>5</sup> a creditor, after numerous applications and threats of legal process, obtained payment from a trader in desperate circumstances, and who, on the evening of the day of payment, committed an act of bankruptcy upon which a commission issued. The father of the trader was a surety for the creditor's debt. The bankrupt being called as a witness on the trial, stated that he paid the money to secure his father, and at the same time to benefit the defendant; that he had no recollection of any threat; and

<sup>1</sup> See *Thornton v. Hargreaves*, 7 East, 544; 7 Bing. 223.

<sup>2</sup> *Thompson v. Freeman*, 1 T. R. 155, A. D. 1786, before Lord Mansfield. *Smith v. Payne*, 6 T. R. 152, A. D. 1795, before Lord Kenyon. *Hartshorn v. Slodden*, 2 Bos. & P. 582, A. D. 1801, before Lord Alvanley.

<sup>3</sup> *Crosby v. Crouch*, 11 East, 256, 260. *Hartshorn v. Slodden*, 2 Bos. & P. 582. *Robinson v. Carrington*, 1 Mont. & Ayr. 1.

<sup>4</sup> *Martinez v. Campbell*, MS. ante.

<sup>5</sup> 7 Bing. 438.

that if any had been used, it would have had no effect on him; that he was not exactly acquainted with the state of his accounts, and did not then contemplate bankruptcy, but perhaps a composition with his creditors; afterwards, however, on the same day, he was advised to become bankrupt. On a motion for a new trial, the jury having found for the assignees, it was elaborately argued whether the applications and threats of the creditor did not preclude any enquiry as to the motive of the bankrupt, or as to what was passing in his mind at the time of the payment. Now in every preceding case, from the time of Lord Mansfield, it has been the sole object of the court and jury to ascertain *quo animo* the payment was made. If there be fraud, it is in the intention and motive of the trader; it is in the cause which determines his act. We may, therefore, express some astonishment that any court should allow a solemn argument whether such fraud was not absolutely negatived by the actions of a stranger; whether, in fact, you may not discover the secrets of one man's mind by looking in another's face. The court, of course, decided that the conduct of the creditor was *not* conclusive as to the motives of the debtor, though Mr. Justice Gaselee strongly inclined to the contrary opinion. An expression of Lord Alvanley, cited in this case, seems to have created some difficulty. That learned judge is reported to have said, "If goods be delivered through the urgency of the demand, or the fear of prosecution, *whatever may have been in the contemplation of the bankrupt*, this will not vitiate the proceeding."<sup>1</sup> Now it is plain from the context, Lord Alvanley merely meant, if a payment be made by a trader *because* a creditor demands it, it is not a fraudulent preference, though the trader at the time contemplate bankruptcy; and the same was said by Lord Mansfield, as we have already noticed. Those noble and learned lords merely said that a contemplation of bankruptcy is not the preferring of a particular creditor, and that an honest creditor is not to be deprived of the fruits of his diligence, because the debtor at the time contemplated bankruptcy. If, indeed, a payment or transfer by a trader be fraudulent and void merely because he at the time contemplates bankruptcy, it must not be called a fraudulent *prefer-*

<sup>1</sup> 2 Bos. & P. 585.

*ence.* The proper weight to be given to threats by a creditor was rightly stated by Mr. Justice Alderson in the case last cited. "Threats on the part of the creditor are a strong circumstance to shew that the payment ensuing is not voluntary [a fraudulent preference]; but if the party be not placed in a better situation by yielding to the threats, or if he disclose such a reason for preference that the threats could obviously have produced no perceptible effect on his mind, those are circumstances which afford a strong inference the other way."<sup>1</sup>

On Saturday the 10th Oct. 1807, Pears, a warehouseman and factor, being pressed for money to answer his acceptances, applied to Ballard and Co. for a loan, who accommodated him with the sum of £1400, to be repaid in a day or two, and received from him, by way of security, two bills. On Tuesday the 13th Pears's affairs became desperate, and he stopped payment. About 3 o'clock in the afternoon of the same day he sent his clerk to Ballard and Co.'s counting-house with three checks, which were delivered accordingly. But after the checks had been put into the clerk's hands for the above purpose, and before they were delivered, a demand was made upon Pears at his counting-house by the firm of Ballard and Co. for repayment of the £1400. Lord Ellenborough:—"I am of opinion that this is not to be considered as a voluntary payment, one of the defendants having called at the bankrupt's before the checks were delivered, although they had previously been put into the clerk's hands for that purpose. The intermediate demand takes it out of the cases hitherto decided upon this subject. There was an intention of giving a voluntary preference; but that intention not having been consummated, the payment stands good."<sup>2</sup>

It is impossible to assent to Lord Ellenborough's reasoning in this case. The question really was, did the creditor receive payment by the preference of the bankrupt? and it is obvious he did. The payment was not at all affected by the demand which was made; the fraud consisted in the intention, and that was complete: hence we were not surprised that the authority of this case was impugned on a late occasion.<sup>3</sup> But

<sup>1</sup> 7 Bing. 460.<sup>2</sup> Bayley v. Ballard, 1 Camp. 416.<sup>3</sup> 7 Bing. 446.

there is a ground upon which, perhaps, his lordship's decision might be supported. The loan was made "*to be repaid in a day or two.*" Might not, then, the payment have been imputed to this previous agreement, rather than to the fraudulent notion of giving a preference? In *Harman v. Fisher*, Lord Mansfield noticed as one badge of fraud that the payment was made pursuant to no contract.<sup>1</sup>

A trader having received an order from the East India Company, applied for a loan to enable him to execute it. The loan was granted on condition that it should be repaid out of the money to be received from the Company. This money was received, and the loan repaid, a short time before the bankruptcy of the trader.

Mr. Justice Littledale said, "To constitute a fraudulent preference two things must concur, first, insolvency in the trader, and secondly, a *voluntary* payment or transfer by him. This payment was not voluntary, but the subject of a special contract made before the money was lent. The reason of the rule is, that all the creditors who have trusted to the general credit of the bankrupt should share his property equally. Here the defendants were no gainers by the transaction. They lent the money, knowing the trader's insolvency, and but for the peculiar bargain for repayment would never have advanced it. In that event the fund from the Company would never have been obtained, so that the general creditors are not in any degree injured."<sup>2</sup>

An army agent, who received the pay of officers and pensions of widows from government by half-yearly issues, frequently paid his customers before the issues were received. He made an agreement with his bankers that they should pay his checks in favour of his customers, and that the government issues should be paid to them, the bankers. On the 9th July the agent committed an act of bankruptcy unknown to the bankers, and a commission issued on the 25th. Between the 9th and the 20th he had received large sums from government for pay and pensions, which were paid to the bankers. The question was raised whether the payment of such sums was a fraudulent preference.<sup>3</sup> Mr. Justice James Parke distin-

<sup>1</sup> Cowp. 124.

<sup>2</sup> *Hunt v. Mortimer*, 10 Barn. & Cres. 44. •

<sup>3</sup> *Vacher v. Cocks*, 1 Barn. & Adol. 145.



guished the case from that of *Hunt v. Mortimer*, last cited. He showed that the fund in *Hunt v. Mortimer* was paid over *before* the act of bankruptcy, and that it belonged to the bankrupt in his own right. But, with great deference, we think these two circumstances do not materially distinguish the cases with respect to the matter in dispute. For what purpose was the previous contract material? Not, whether it was binding or not binding upon the bankrupt and his assignees or his cestui que trust, but simply to raise the presumption that the payment by the bankrupt originated in another motive than the protection of one or more creditors from a common loss. A jury can only judge of the motives of a trader by the nature of his acts and the circumstances by which they are surrounded; and surely a previous agreement, though of the slightest nature, may be fairly supposed to influence his mind.

It is certainly immaterial whether the cause which influences a trader's mind in making a transfer be, in the eye of the law, a reasonable and sufficient cause or not. Thus the delivery of goods by an insolvent trader, after he had stopped payment, to a creditor, the manufacturer of them, was held not to be a fraudulent preference, because it appeared that the creditor claimed them on a right to stop them *in transitu*, and that the bankrupt, after consulting counsel and his creditors, assented to the claim under the idea that it was well founded, though it was not.<sup>1</sup>

We have already alluded to the difficulty of separating the contemplation of bankruptcy from the giving of a preference, and the more closely we examine the cases the more we are induced to think that the true doctrine is, that he who in the judgment of the law gives a preference must be assumed to have contemplated bankruptcy. Undoubtedly, a man may contemplate bankruptcy, and may yet make a payment or a transfer from no fraudulent or improper motive; but if it be proved that his object and intention was to favour a creditor, it necessarily follows that he contemplated that the rest of his creditors would not receive the same or an equally beneficial payment. In none of the cases we have hitherto examined

<sup>1</sup> *Dixon v. Baldwin*, 5 East, 175. See *Thompson v. Freeman*, 1 T. R. 155.

was it contended or implied that it was necessary, in order to constitute a fraudulent preference, that the trader should act under the precise impression or contemplation that his estate would be divided under a commission of bankruptcy.

A trader, on the 2d June, informed a creditor, to whom he was indebted on a bill, (but informed no other person), that his affairs were bad, and would not pay above 10s. in the pound. Upon this the creditor said the trader must pay his bill, and that if he would, he, the creditor, would be security to the trader's creditors for so much as the estate should produce, if they agreed to a composition. The trader paid the bill, and was a bankrupt on the 5th June. Lord Eldon, C. J., held that this was a fraudulent preference.<sup>1</sup> Here the application of the creditor for payment was accompanied by the circumstance of the bankrupt having called upon the defendant two days before the bill became due, and, after disclosing his situation, acceding to the creditor's offer, from which his lordship thought the jury were justified in inferring fraud. Thus his lordship and the jury thought the facts proved that the payment by the trader was induced by his favour to the creditor, and that consequently it was void, for it seems not to have occurred to them as material, that at the time the trader rather contemplated composition than bankruptcy.

The case of *Wheelwright v. Jackson*,<sup>2</sup> in 1813, involved almost precisely the same facts, and it is to be regretted that Lord Eldon's decision was not remembered. The only difference seems to have been that the trader, although he knew his affairs to be embarrassed, expected his estate was solvent; and the negotiation for a composition occupied a longer time. Mansfield, C. J., and the Court of Common Pleas held, that the payment was not void, simply because the trader at the time did not contemplate that a commission of bankrupt would be issued against him.

In *Fidgeon v. Sharpe*,<sup>3</sup> in 1814, in the same court, but before Gibbs, C. J., the doctrine that it is necessary that bankruptcy should be expressly contemplated received some favour, but the case did not necessarily involve the decision of

<sup>1</sup> *Singleton v. Butler*, 2 Bos. & P. 283, A.D. 1800.

<sup>2</sup> 5 Taunt. 109.

<sup>3</sup> *Id.* 539.

the point; at least, Chambre J. expressed his opinion that the facts proved that the transfer of goods in question was made under no idea whatever of giving the creditors who received them a preference.

But the opinion that a trader may give a preference, in the legal sense, and yet that it will not be void unless he actually contemplate the issuing of a commission of bankruptcy, is expressly contradicted by many cases of excellent authority.

In *Simpson v. Sikes*,<sup>1</sup> in 1817, it was stated in a case for the opinion of the Court of King's Bench, that Wilkinson, a country banker, after he had stopped payment, but before the commission of an act of bankruptcy, delivered to his London agent, to whom he was greatly indebted, money and securities; that he acted under no expectation of assistance, but in order to reduce the balance; that he had no idea it would give the defendant, the London agent, an undue preference; that none of the parties had an act of bankruptcy in contemplation until after this transaction; but that each of them knew the house to be insolvent. Lord Ellenborough, C. J., observed, "With respect to what was received from Wilkinson, it is stated, indeed, that he had no idea of giving an undue preference, and that he had no contemplation at that time of any act of bankruptcy; but every man must be considered as contemplating and intending the necessary consequences of his own acts, and without assistance from the defendant he knew ruin to be inevitable. Bankruptcy was one of the natural consequences or concomitants of such ruin; and in case of bankruptcy, these receipts from Wilkinson would of necessity give the defendant an undue preference. Wilkinson had no hope of assistance at the time. His own view, therefore, must have been to give the defendant a preference, when he knew himself insolvent, and when ruin and bankruptcy were staring him in the face." Here we observe this learned judge deduced the motive of the trader from his act and the circumstances by which it was attended, disregarding entirely his assertions.

In *Poland v. Glyn*,<sup>2</sup> Abbott, C. J. is reported to have said, that if a tradesman found himself in such a situation that in

<sup>1</sup> 6 Mau. & S. 295.

<sup>2</sup> 4 Bing. 22, n.

the judgment of any reasonable man a bankruptcy was inevitable, no voluntary payment by him could be good. Bayley, J.—“ It is a rule of law, that if a man be in such a situation that he must be presumed to think bankruptcy probable, then if he makes a payment with a view to put one creditor in a better situation than the rest, such payment cannot be supported. If it was probable that a bankruptcy must ensue, then it may be predicated of him that he contemplated it.” Best, J.—“ The bankrupt was not moved to the payment by any thing done by the defendant; he paid because he thought himself bound in honour. If he did not know he was insolvent, why was he bound in honour to pay defendant’s debt first? Clearly, therefore, he did contemplate bankruptcy.<sup>1</sup>

In *Hook v. Jones*,<sup>2</sup> in 1826, the Court of Common Pleas approved of the following direction to a jury: that if they believed that the bankrupt at the time of the payment in question knew that he could not go on, knew that there was a probability of his becoming a bankrupt, and had preferred a particular creditor in contemplation of bankruptcy, the plaintiffs would be entitled to a verdict.

Perhaps the result of the cases on this point may be stated thus:—if a trader, having stopped payment, or whose estate is so clearly insolvent, or his affairs so greatly involved and embarrassed that it is manifest he must shortly stop payment, officiously make a payment or transfer to a creditor, such payment or transfer must be deemed fraudulent and void, as having been made in contemplation of bankruptcy, and officiously. Mr. Justice Littledale, we may observe, in *Hunt v. Mortimer*,<sup>3</sup> stated that insolvency in a trader, and a voluntary payment or transfer by him, constituted a fraudulent preference.

But we can imagine a case where there might be a fraudulent preference without an actual insolvency. Suppose a trader’s estate is clearly solvent, but that his affairs are greatly embarrassed and cannot be shortly wound up, and that he is compelled to stop payment, if he then officiously make a payment or transfer, would it not be fraudulent and void, if a

<sup>1</sup> Best, J., here clearly shows the close connection there is between an actual preference and the contemplation of bankruptcy.

<sup>2</sup> 4 Bing. 20.

<sup>3</sup> 10 Barn. & Cr. 46.

commission of bankrupt issued against him? Might not a fraudulent motive be justly imputed to him, if he so preferred one of his creditors as to save him from the delay, anxiety, and trouble of getting payment under a commission, to which the other creditors were exposed? The material question, then, with respect to an officious payment or transfer seems to be, was the trader at the time of making it in such a situation that he did contemplate a bankruptcy as probable?

Since the above observations were written, the Court of King's Bench, in the case of *Morgan v. Brundrett*,<sup>1</sup> has expressed a strong opinion that the recent cases, with respect to inferring a contemplation of bankruptcy, have gone too far.

The real nature of the question, whether fraudulent preference or not, being understood, it is obviously immaterial to a creditor obtaining payment or security, how the debtor was induced to make or give it, so only that it did not proceed from favour or partiality towards himself. Hence a transfer of goods by a trader on the very eve of bankruptcy, from an apprehension of being prosecuted for forgery, has been held valid.<sup>2</sup>

In a note to the last cited case, the learned reporter, Mr. Montagu, puts a query—"Are not the motives by which a debtor is influenced to part with property on the eve of bankruptcy, either, first, to preserve his credit; or secondly, to give a preference to a creditor?" We answer, a man on the eve of bankruptcy cannot be supposed in making a payment to consider the preservation of his credit; and yet we say that a man, on such an occasion, may make a payment without being moved thereto by a desire to give a preference. If, indeed, the doctrine of fraudulent preference were fully and correctly stated in this query, no payment on the eve of bankruptcy could be valid. But it is manifest that many motives not condemned by the law may then operate to induce a payment. A valid payment might then be made on the application of a creditor in consequence of a previous contract, from an apprehension of a criminal prosecution; nay, it is possible that the mere application of a creditor might, under the cir-

<sup>1</sup> 5 Barn. & Adol. 289.

<sup>2</sup> *De Tastet v. Carroll*, 1 Stark. 88. S. C. 1 Mont. Cases in Bankruptcy, 145. Ex parte *De Tastet*, Ibid. 138.

cumstances, justify a jury in concluding that a payment then made was not a fraudulent preference.<sup>1</sup> Of course, when a trader, knowing he cannot stand, makes a payment on the ground of a motive sufficient to rebut the presumption of a preference which naturally arises from the time the payment is made, such motive should be shown.

The following case strongly illustrates the influence which the mere pressure of a creditor has in preventing the doctrine of fraudulent preference arising. Mrs. Greenwood having a demand on Samuel Churchhill for the sum of £2200, in respect of trust-moneys possessed by him, made an application to him, with strong pressure for security, early in the year 1826, at which period Churchhill was clearly insolvent, and in fact overwhelmed with debt; and a short time afterwards several writs of execution were issued against him, some of which were for very small sums, as £27. Upon such application being made to Churchhill, he gave his bond for the amount, with interest, at two months. That bond not being paid when due, Mrs. Greenwood brought an action and obtained judgment. In the month of October 1826, it was proposed to Mrs. Greenwood, that if she would not execute her avowed intention to sue out execution on this judgment in the following Michaelmas term, Churchhill would execute a security to her for the amount on his Oxfordshire estate, which security Mrs. Greenwood agreed to accept, and accordingly the same was executed in the month of January following, previous to which period Churchhill had committed an act of bankruptcy, but of which Mrs. Greenwood had no notice; and in the month of March following a commission of bankruptcy issued against Churchhill, but more than two months after the execution of Mrs. Greenwood's security. It was sought to impeach this security on the ground of its being a fraudulent preference; but Sir John Leach, M. R. held clearly that it was valid, saying, after stating the facts, and particularly the pressure by the creditor, "it is difficult to conceive the principles on which this deed can be questioned."<sup>2</sup>

<sup>1</sup> See Lord Mansfield's judgment in *Alderson v. Temple*, 4 Burr. 2235; and in *Rust v. Cooper*, Cowp. 629.

<sup>2</sup> *Robinson v. Carrington*, 1 Mont. & Ayr. 1. S. C. 1 Myl. & K. 546. See also *Belcher v. Prittie*, 10 Bing. 407.

We are persuaded that much misapprehension and difficulty has arisen with respect to this doctrine of fraudulent preference, from the exclusive appropriation of the term *voluntary* to payments induced by a preference. Without any metaphysical refining, it is plain a payment may be voluntary, though not induced by a preference: indeed, whatever be the motive which influences a trader to make a payment, he makes it voluntarily; he acts as under the present circumstances seems best to him. The expression "voluntary preference" is manifestly incorrect.<sup>1</sup> It is important that the term "preference" should be rightly understood. If an insolvent trader, who may be supposed to have all his creditors before him in his mind's eye, through *personal favour* selects, chooses or prefers one to receive payment, this is a preference in the strictest and most proper sense, and is, under the circumstances, deemed by the law fraudulent. But though a creditor apply to an insolvent trader for payment, and receive it, not through personal favour, there is still a *preference* or choice on the part of the trader, but of a different kind, and such is not considered fraudulent. Hence in many cases we find the term *preference* used to signify the advantage gained by a creditor through the act of the debtor, in whatever motive that act originated; and in consequence of this general meaning of the term, it has been found necessary to use some epithet when it is wished to designate that particular kind stigmatised by the law as fraudulent.

One more observation, and we have done. By the 81st section of 6 Geo. 4, c. 16, the present Bankrupt Act, all dealings and transactions by and with any bankrupt, *bonâ fide* made and entered into more than two calendar months before the commission against him, shall be valid, provided the party have no notice of a prior act of bankruptcy. A transaction must be deemed *bonâ fide* when the parties mean nothing by it but what is apparent,—when it is not a contrivance to conceal some secret purpose. Now if a delivery or transfer of goods be made by a trader more than two calendar months before the issuing of a commission against him, to a creditor, in satisfaction, or part satisfaction, of an existing debt, and the creditor have no notice of a prior act of bankruptcy, can such a

<sup>1</sup> See it in *De Tastet v. Carroll*, 1 Stark. 88, among other cases.

delivery or transfer be deemed fraudulent and an act of bankruptcy? Lord Tenterden, at nisi prius, thought not; "for the fraud, as it is termed, only consists in the evasion of the Bankrupt Law, and is not inherent in the nature of the transaction."<sup>1</sup> That learned judge for one moment forgot that an "evasion of the Bankrupt Law" is the very essence of a fraudulent preference, and his decision has been overruled by the Court of Common Pleas.<sup>2</sup>

W. C. W.

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ART. V.—WHITE'S EDITION OF CRUISE'S DIGEST.

*A Digest of the Laws of England respecting Real Property.*

By William Cruise, Esq. Fourth edition, revised and considerably enlarged. By Henry Hopley White, Esq. Barrister at Law. London: Saunders and Benning. 1835.

WE have always considered the plan of this work extremely well adapted both for reference in practice and for the instruction of pupils, and this our opinion seems to be confirmed by the steady sale which has attended the successive editions. Mr. Cruise's object, as we understand it, was to give a view of the leading doctrines respecting the different parts of the Laws relating to Real Property, without pursuing those doctrines into all their ramifications and details, but at the same time illustrating and proving the grounds on which they were established by copious extracts from the leading cases. And if it be true, as it undoubtedly is, that practitioners as well as students should seek for general principles, and not merely confine their attention to the naked point decided, it is most important and instructive to view the foundations of our Real Property Law, as traced out and established in the luminous judgments of Lord Hardwicke and other sages of the law.

It cannot be denied that the first edition of Mr. Cruise's work contained many grievous errors and mis-statements: every succeeding edition has been improved in this respect; but still, though the present editor speaks truth when he says that

<sup>1</sup> Verba Lord Tenterden, C. J., in *Tucker v. Barrow*, 1 Moo. & Mal. 141. See 5 Taunt. 545.

<sup>2</sup> 9 Bing. 107.



the edition which he presents to the public has been revised, we regret to say that errors and blemishes yet remain which a little more care and circumspection could easily have removed. We do not pretend to have examined every part of this voluminous work with a critical eye, but two or three of the most popular titles we have read over with care, and we shall proceed to give our readers some of the products of our labour.

We may observe generally, that Mr. White has in many places corrected and amended the text by the insertion of words and paragraphs, which, however, are easily distinguishable from the text of his author; he has appended, too, several notes; and has added two entire new chapters on most useful and interesting subjects to the profession; one on powers of sale and exchange, the other on the doctrine of merger. He states in his preface, that nearly 1100 cases, either stated or referred to, have been added in the present edition; and the Acts relating to Real Property passed in the last session of parliament, as well as previous enactments which have been passed since the publication of the third edition, are referred to throughout the work. The editor has also offered some observations upon a few points that have occurred in practice, principally respecting the construction of the English Act for abolishing Fines and Recoveries.

With this general statement, which we have extracted from the editor's preface, we turn now to the title "Mortgage" in the second volume, upon which we propose to make some particular remarks. As a specimen of the editor's annotations we shall first extract the following correct and useful note on the subject of leases granted of estates in mortgage.

"To the creation of a valid lease of an estate in mortgage, the concurrence of the mortgagee and mortgagor is essential. The mortgagee having the legal estate should demise, and the mortgagor should also demise and confirm. The rent may be reserved generally, and the covenants from the lessee should be made with the mortgagee, and also with the mortgagor, severally. Sometimes a power is reserved in the mortgage for the mortgagor to appoint by way of demise, in which case the lease takes effect as an appointment of the use to the lessee for the term: in this instance the reservation may be general, and the covenants should be entered into with the mortgagee, and also with the mortgagor, severally, as where the lease operates as a common law demise.

" If the mortgage is of leaseholds, of course the mortgagor cannot, under a power to lease in the mortgage deed, make an underlease of the legal estate, without the concurrence of the mortgagee."<sup>1</sup>

We must object to Mr. Cruise's definition or description of a mortgage as " a conveyance of lands as a pledge or security for the repayment of a sum of money borrowed, with a proviso that such conveyance shall be void on payment of the money borrowed, with interest, on a certain day." For it is obvious that a conveyance by way of mortgage is almost universally made with a proviso, not that it shall be void on payment of the money, but that the mortgagee shall in such case reconvey the premises.

The objection to a mortgage in fee, that in case of the death of the mortgagee the estate in the land goes to his heir or devisee, while the money belongs to his personal representatives, which, Mr. Cruise rightly states, is often attended with great inconveniences, may be obviated, as we have already stated in this work, by giving the executors of the mortgagee power to appoint the mortgaged premises through the medium of the Statute of Uses; at the same time confining this power within the term of twenty-one years from the death of the mortgagee, (so as not to offend against the rule against perpetuities), and in default of appointment, limiting the fee to the mortgagee in fee. This plan gives the same persons dominion over the estate in the land who are entitled to the money, and renders any recurrence to the heir at law or devisee of the mortgagee quite unnecessary.

Mr. Cruise states, that the Court of Chancery will relieve the mortgagor against " all restraints imposed upon the equity of redemption;" but this is scarcely expressed with sufficient precision, for though it is undoubtedly true that the mortgagor cannot be absolutely barred of this equity by any agreement made at the time of the mortgage, yet we apprehend we should go beyond the intention of the Courts if we were to adopt Mr. Cruise's rule, and conclude from it, that even an agreement that the mortgagor should not redeem the premises for a limited term, as five or six years, which is often found in mortgages, is void and of no effect.

The statement of the case of *Mellor v. Lees*<sup>2</sup> is incorrect

<sup>1</sup> 2 vol. 87.

<sup>2</sup> 2 Atkyns, 494.

enough as given in Atkyns, but it is still worse as we find it in the text before us.

It is laid down in the chapter we are reviewing, that a mortgagee may, upon nonpayment of the interest, give notice of the mortgage to the tenants of the mortgaged premises, and so acquire a right to the rents then due and unpaid. We object to the qualification *upon nonpayment of the interest*, for we apprehend it is clear that if default be made in payment of the principal only, a mortgagee may enter into receipt of the rents, and apply the same in reduction of his debt. That the mere receipt of interest by a mortgagee does not preclude him from asserting his right to the possession of the mortgaged premises, is proved by the case of *Doe v. Cadwallader*, 2 Barn. & Adol. 473.

We think the opinion attributed to Lord Hardwicke, that a second mortgage or further charge, merely to secure interest in arrear, is "a hardship upon the mortgagor and an act of oppression," was scarcely deserving of being cited, for certainly such a transaction does not deserve such a character; if there be any hardship at all it is upon the mortgagee, who has been unjustly deprived of the use of his interest for the time it has remained unpaid.

We should have been inclined to add an observation to Mr. Cruise's objections to second mortgages: his first objection, that they may be defeated by a third mortgagee paying off the first without notice of the second, may be effectually removed by indorsing a memorandum of the second mortgage on one or more of the principal deeds, to which the first mortgagees would seldom object, unless they were desirous that their money should be paid off. And as to the objection, that the second mortgagee has no legal remedy for the recovery of his money, it is in a great measure obviated by the practice of giving him a power of sale, by which he can easily render his security available.

It is a rule in Chancery, that in all cases where the legal estate is outstanding, incumbrancers claiming under the beneficial owner or cestui que trust, must be paid according to the dates of their respective securities, but with this qualification and distinction, first insisted upon by Lord Chancellor Cowper, that a puisne incumbrancer has not acquired a better or

preferable right in the consideration of the Court of Chancery to the protection of such legal estate. It is not our intention to detail the various modes by which a puisne incumbrancer may obtain such better or preferable right, many of which are noticed in the fifth chapter of Mr. Cruise's article on the subject of Mortgages, but we must remind our readers of one which is omitted to be mentioned either by himself or his editor, viz. the doctrine of notice acted upon in so many recent cases, and especially in that of *Forster v. Blackstone*,<sup>1</sup> which decision has been affirmed in the House of Lords.<sup>2</sup> The doctrine is simply this, that if there be two or more equitable incumbrancers, and the second or third, for example, before he lends his money, gives notice of his intention to the person, or any one of the persons, in whom the legal estate or interest is vested, of his intention so to do, and does not receive from him, or from any other source, notice of any prior incumbrance, the party so giving notice will be preferred to any prior incumbrancer who has not used the same precaution. This doctrine, we apprehend, applies to all cases where the legal estate is outstanding, whether in a mortgagee or a mere trustee, and also to all descriptions of property whatever, whether real or personal, which is capable of being held in trust and of being given as a security: thus, for instance, if a party, after having granted a mortgage of the legal estate, should make two or three charges upon the equity of redemption, and if the second equitable incumbrancer were, before advancing his money, to give such notice as above mentioned to the first mortgagees, we apprehend his mortgage would be preferred to that of the prior incumbrancer who had neglected to take such a step. Indeed a point somewhat similar to this was decided, after great consideration, by Lord Hardwicke, in the case of *Ingram v. Gibson*, stated by Mr. Cruise, and reported in *Ambler*, 153. There, a mortgage in fee was made to one Gibson for the sum of 50,000*l*. Gibson gave declarations of trust to several persons who had advanced portions of this sum, amounting to rather more than one-half of the principal money secured. Gibson subsequently became the purchaser in fee simple of the mortgaged premises, and they were conveyed to him without any notice of the

<sup>1</sup> 1 *Myl. & Keene*, 297.<sup>2</sup> 10 *Legal Observer*, 281.

equitable incumbrances. Gibson afterwards mortgaged the estate to Mr. Pelham, to secure an advance made by him, but reserving or excepting in the mortgage deed some, but not all, of the equitable incumbrances secured by the declarations of trust. One of the questions before the Court was, whether the creditors excepted in Mr. Pelham's mortgage deed had gained any preference by such exception over those who were not excepted; and Lord Hardwicke unwillingly decided that they had, for he said, "I heartily wish all the creditors could come in equally;" but he thought himself bound by the rules of the Court respecting notice. He observed, "This conveyance, though by way of mortgage to Mr. Pelham, comes very near a conveyance to trustees to sell, as the creditors excepted could only have remedy by a sale; for having no legal estate in them, a decree of foreclosure would have signified nothing to them, as foreclosure is of no effect but where the party foreclosing has the legal estate; the question therefore turns upon the rules of the Court as to notice, which binds the conscience of the party as to the right of another party whereof he has notice, and this Court always raises an implied trust from that notice; so Mr. Pelham, having notice of these excepted creditors, became a trustee for them, and his conscience was bound as to those creditors' demands, but could not be so as to other creditors of whom he had no notice. Upon the rules of the Court, therefore, I am of opinion that I cannot divest the excepted creditors of the right they have acquired by Mr. Pelham having notice of their demands." It is important to remark that Lord Hardwicke grounds his decision simply upon the fact of notice, and not upon the kind or manner of it. In the report in Ambler he is stated to have said, "I do not know that I can carry this exception [viz. the exception of some of the creditors in the mortgage deed] farther than notice, and it is no more than the telling the mortgagee there were no other creditors than these excepted, the same as if notice in pais."

This case shows the importance which attaches to notice given by an equitable incumbrancer, and also points out the necessity of caution on the part of a mortgagee having the legal estate who receives notice of any charge on the equity of redemption, for such notice constitutes him (the mortgagee)

a trustee, and if he were afterwards to transfer or dispose of the legal estate, otherwise than as he might be allowed to do by virtue of his own mortgage deed, to the prejudice of the party giving notice, he (the mortgagee) would be answerable as for a breach of trust, and might be decreed to make satisfaction to the party injured.

Lord Lyndhurst states the principle of the decisions respecting notice to be this: first, that if a contrary doctrine were to prevail, it would enable a cestui que trust to commit a fraud; who might assign his interest to A., and afterwards to B., B. having no opportunity by any communication with the trustees of ascertaining whether or not there had been a prior assignment of the interest; and secondly, that till notice be given to the trustees, they do not in fact become trustees for the assignee. This latter reason it will be observed, is that which prevailed with Lord Hardwicke; but his very important judgment is not referred to in any of the recent cases.

We think Mr. White has not sufficiently stated the doctrine established in the case of *Parry v. Wright*,<sup>1</sup> so important as it is to conveyancers. There, one Madocks purchased an estate subject to two mortgages, the first for 3000*l.*, and the second for 200*l.* Madocks subsequently contracted to sell an annuity of 500*l.* to Wright for 5000*l.*, out of which sum it was agreed the mortgage for 3000*l.* should be paid off. Now how was this contract carried into execution? Wright had notice of the second mortgage for 200*l.*, but still he was entitled to require that he should stand in the place of the first mortgagee to the extent of his mortgage, and such, no doubt, was the intention of the parties; and there was no difficulty whatever in effectuating such an intention, to which, indeed, the facts of the case seemed naturally to lead; but, unfortunately, this intention was defeated by the machinery adopted by the parties. The contract with Wright was carried into effect by two deeds bearing even date, but the Court allowed that the effect would have been the same had the two deeds been comprised in one. By the first deed the first mortgagee, in consideration of his principal and interest paid by Madocks, conveyed the premises, by the direction of Madocks, to Girdlestone in

<sup>1</sup> Sim. & St. 369; affirmed on appeal, 5 Russ. 142.

fee, without the declaration of any trust. By the other deed, which recited the facts, and that the mortgage debt had been paid off out of the monies of Wright, Madocks granted an annuity to Wright, and then Girdlestone, by the direction of Madocks, demised the premises for 500 years to a trustee for Wright to secure the annuity. Subsequently the second mortgagee for 200*l.* filed his bill, claiming to be the first incumbrancer on the estate, and this claim was allowed first by Leach, V. C., and afterwards by Lord Chancellor Lyndhurst, simply on the ground that Wright had permitted the estate to be conveyed to Girdlestone, who was by construction a trustee for Madocks alone.

Again, in another case<sup>1</sup> in which there were three mortgagees, the second mortgagee contracted with the owner for the purchase of the premises in consideration of the amount of the three mortgage debts; and in consideration of the amount of the first and third mortgage debts, which the purchaser covenanted to pay, and of the amount of the second mortgage debt, the owner conveyed the premises to the second mortgagee, subject to the first and third mortgages. This conveyance was held to merge the second mortgage debt, so that in a suit for foreclosure the purchaser was allowed to derive no benefit whatever from the second mortgage, the third mortgagee ranking thenceforth as second.

Now it is obvious that these cases are calculated to afford a most important caution to practitioners, namely, never to state a contract nor frame a conveyance so as unnecessarily to give to any party the benefit of a payment made by another. Thus, for example, if an estate be purchased which is subject to a mortgage, the contract should be for the equity of redemption; and if it be intended that the mortgage debt should be paid off, the recital of the contract should be followed by a recital of the amount due on the mortgage, and then an agreement between the mortgagee and purchaser alone, that the mortgagee should convey to the purchaser on payment of the sum due, and the mortgagee should not convey by direction of the mortgagor. So in all cases where a mortgage for a term is paid off by a purchaser, it is improper to state that the term is assigned to the purchaser's trustee by

<sup>1</sup> *Brown v. Stead*, 5 Sim. 535.

the direction of the mortgagor, for that seems to give the purchaser a title to the term only through the vendor or mortgagor, and so might render the term subject to any incumbrance between the mortgage and the purchase, of which the purchaser has either express or implied notice. The doctrine of the cases last referred to is not new, nor are the cautions we have ventured to give, for we find them in substance in 2 Bridgman's Conveyancing, p. 392.

We pass on now to the Chapter on Powers of Sale and Exchange, in the fourth volume, which has been added by Mr. White. We find the points which have been decided on these powers carefully collected, and full consideration is given to the important question how a power of sale may be affected by the rule against perpetuities. This rule, we apprehend, is now well settled, and it is this,—any limitation which simply by itself might, for a longer period than a life or lives in being and twenty-one years after, prevent property, whether real or personal, from being absolutely vested, is void. By absolutely vested, we mean the absolute beneficial right being fixed in a person so as to be transmissible to his representatives or capable of being aliened. Now let us apply this rule to the case of the usual settlement of freehold land; there the premises are limited to the father for life, with remainder to his first and other sons successively in tail, with other remainders over, and a power is given to the trustees to sell or exchange the property, with the consent of the person for the time being beneficially entitled to the rents, if of full age, and if a minor, then with the consent of his guardian. This power of the guardian to consent, it is obvious, might continue for a considerable period; the first tenant in tail might die under age leaving issue, and thus a power of sale, independent of the person in whom the legal estate in the land was vested, might, to use Lord Eldon's expression in *Ware v. Polhill*, "travel through minorities for two centuries;" but still such a power cannot possibly prevent the premises settled from becoming absolutely vested, or the absolute beneficial right thereto being fixed in the person to whom the same are destined by the deed, and thus we apprehend such a power clearly does not offend against the rule against perpetuities; and so the point has been decided in two cases stated at



length by Mr. White, and reported in 4 Simons, p. 138.<sup>1</sup> Both the cases were suits by vendors for a specific performance of a contract for sale, the point was argued by very able counsel, and one of the judges is said to have overruled the exception to the title made on the ground of the power being void without the slightest hesitation, merely observing, "pooh, pooh, there is nothing in it."

The cases just referred to, no doubt, originated from some expressions reported to have been used by Lord Eldon in the case of *Ware v. Polhill*,<sup>2</sup> but there the facts were very different. A testator devised freehold estates to A. for life, with remainders over in strict settlement to his first and other sons in tail; and also bequeathed leaseholds to trustees upon trust to pay the net rents and profits to the person or persons who, under the limitations thereinbefore contained, should from time to time be entitled to the rents of the freehold estates. The trustees were then empowered at any time thereafter, with the consent of the person or persons who should as aforesaid be entitled to the rents of the freehold estates, or in case such person or persons should be a minor or minors, then at the discretion of the said trustees, to sell the leaseholds, and to invest the money in the purchase of freeholds, to be settled to the same uses as the freeholds devised. The power was not exercised, and the tenant for life died, leaving a son who died an infant; then the question arose between the personal representatives of the son and the persons entitled in remainder to the freehold estates, whether the power of sale in question operated to prevent the leaseholds vesting absolutely in the son, which of course they otherwise would have done though he died under the age of twenty-one years. If the power of sale were valid, it would certainly have had the effect contended for by the remainder-man, for a Court of Equity would not have permitted the leaseholds to be taken out of the settlement by the personal representatives of the infant son, merely because the trustees had omitted to exercise their power of sale, that is to say, it could not have been held, that it rested absolutely with the trustees to say whether or not the leaseholds should go to the remainder-man. But trying this power of sale by the rule above given

<sup>1</sup> *Biddle v. Perkins*, and *Earl of Powis v. Capron*.

<sup>2</sup> 11 Ves. 257.

against perpetuities, it was clearly void; and so it was decided to be by Lord Eldon. His lordship's objection to it, as given in the report, was, that it might travel through minorities for two centuries; meaning, no doubt, that the son of the tenant for life who died under twenty-one, might have left issue who might also have died under that age, and so on, and thus a power of sale would have existed during such minorities in the trustees, and would have prevented the absolute beneficial right to the leaseholds becoming vested or fixed in any person so as to be transmissible to his representatives or capable of being aliened. It is important to observe, that Lord Eldon held in this case, that the power being bad to the extent to which it was given; it could not be modelled to make it good.

Suppose, now, a freehold lease is devised to A. for life, with remainder over to his children as tenants in common in fee, and the power is given to trustees, with the consent of the person or persons who should for the time being be entitled under the limitation contained in the will to the rents of the premises, or in case such person or persons should be a minor or minors, then at the discretion of the trustees or trustee, to sell the property,—would such a power of sale be valid? We think it would, for it does not seem open to the same objections which prevailed in *Ware v. Polhill*; for assuming the tenant for life to die, leaving a son, and he were afterwards to die under twenty-one, leaving issue, the power could not divest the absolute beneficial right derived under the limitations in the will; nor prevent the property from descending in the usual course or being aliened. The ground on which such a power is valid, is, that the consent of the persons beneficially entitled, if of age, is required; so that if such persons alien they destroy the power, and prevent its operating a perpetuity. If the estates in remainder be estates tail, it does not seem important whether such a consent be required or not, for a tenant in tail may by his own act destroy a power attendant on his estate; and on this ground *Leach, M. R.*, decided the case of *Waring v. Coventry*,<sup>1</sup> which involved the question whether the usual power of sale in a strict settlement of land was valid or not, and that learned judge held it was, observing, “the power is co-extensive only with the estates

<sup>1</sup> 1 Myl. & K. 249.

tail, and may like them be destroyed." It may be observed, that a valid power of sale may even after the allowed period operate to change the identical land settled, and substitute other land in its place; but it is plain such an effect would be no infringement of the rule against perpetuities when rightly understood. The rule is not to prevent powers continuing beyond the specified period, but to obviate the inconvenience of estates being divested, and consequently alienation prevented thereafter.

Suppose again, that, in the case just assumed, the power of sale had been for the trustees to sell with the consent of the tenant for life during his life, and after his decease at the absolute discretion of the trustees, would the power have been vested? So far as it regards a sale under the power during the lifetime of the tenant for life, we have the authority of the case of *Boyce v. Hanning*<sup>1</sup> for saying that the power might be relied upon; but the decision of the Court, which is merely expressed in their certificate to a case sent out of Chancery, does not state whether this was on the ground that such a power was good to its whole extent, or that the limitation might be considered as conferring two powers, one with the consent of the tenant for life, and another arising on his death. But we are inclined to think that such must have been the ground of the decision, for it seems to us that the power on the death of the tenant for life, which was given absolutely to the trustees, was not consistent with the rule against perpetuities; for how could any of the children, or their issue, have destroyed such a power?—and if not, it is plain they would not have had an absolute beneficial estate capable of being aliened. Mr. White considers the point we have just mooted as doubtful; but though we believe it is untouched by any decision, we have the opinion of three eminent conveyancers which coincides with that we have just expressed. It was proposed that, on a mortgage, the premises should be limited to such uses as the mortgagee, or his executors or administrators, should appoint, and, in default of appointment, to the use of the mortgagee in fee. This proposition was considered in consultation by Messrs. Duval and Brodie, and objected to by them as tending to a perpetuity, and their opi-

<sup>1</sup> 2 Crom. & J. 334.

nion was subsequently approved by Mr. Hayes. Of course the unlimited power given to the personal representatives of the mortgagee, would have prevented his real representatives from conveying the property vested in them under the limitation in the mortgage deed, and thus the power would have infringed the rule against perpetuities.

But it might perhaps be contended, in case of an absolute power of sale being given to trustees in a will over property devised to persons in fee, that such a power, though unlimited in terms, does not tend to a perpetuity, on the ground that the devisee or devisees in fee may destroy it simply by their alienation or other disposition; and that, though the consent of the persons for the time being beneficially entitled is not required in terms, yet the rule of law, which provides that an estate in fee, whether limited by deed or will, cannot be deprived of its ordinary incidents, renders such a consent necessary and thus supplies that which is sufficient to make the power valid. But this argument goes too far, for it would prove that if a testator limited property to such uses as A. and B. should, during the life of C., appoint, and, in default of appointment, to the use of D. in fee, the power is void, which cannot be maintained.

It is clear that if a power of sale in a will be given during the continuance of the trusts, and the trusts be within the allowed period, the power is valid.<sup>1</sup>

The following case and opinion are well deserving of notice in this place. Land was settled on A. for life, with remainder over to his first and other sons successively in tail, with the usual power for the trustees,—releasees to uses,—to sell with the consent of tenant for life. Subsequently to the settlement, A. granted a lease for an absolute term of twenty-one years, without reference to the duration of his life-estate, and not warranted by his power of leasing, but at rack rent and with the usual covenants. The trustees, some years after, with the consent of the tenant for life, contracted to sell the reversion in fee to the tenant. In the interval between the lease and sale the tenant had made great improvements, and at the time of the sale the rent payable by him under his lease was not half the amount of the actual value of the premises. Under

<sup>1</sup> *Trower v. Knightley*, 6 Madd. 134.

these circumstances a doubt arose as to the validity of the sale, which was referred to a very able conveyancer, who gave the following opinion:—

“ The trustees would not be warranted in selling subject to the lease in question. The power contemplates the sale of the fee-simple in possession, and it would be a fatal objection to the execution of the power that the interest assumed to be sold is not the description of interest which the trustees are authorized to sell—the purchaser would not acquire a good title either at law or in equity.

“ I had occasion lately to consider this point in consultation with a very eminent conveyancer. There the tenant for life, with power of leasing, had granted a lease not warranted by the power, and the trustees contracted to sell, subject to the lease. The parties were very anxious to complete the sale; but, though the rent reserved was stated to be the fair value, we could not devise any mode by which the power could be well executed during the subsistence of the lease.

“ If a sale, made expressly and avowedly subject to the lease, would be invalid, no contrivance can make it good. The difficulty cannot, I think, be got over by the tenant for life paying the value of the lease to the trustees, as suggested; still less by a suppression of the real character of the transaction. The execution of the power, in order to be unimpeachable, must stand perfectly clear of all dealing and understanding with respect to the lease.

“ By the execution of the lease, the competency of the tenant for life to consent to the execution of the power, was gone *pro tanto*. I think that, before the power can be executed, the lease must be put an end to, and the fee-simple in possession must then be sold at a price calculated with reference to the increase of value arising from the lessee's expenditure in improvements.

“ The existence or non-existence of an agreement prior to the lease for an expenditure on the property must, I think, be laid out of the case. The only point for consideration is, whether the trustees sell the precise subject which they are empowered to sell, and whether they get the fair value of it.—May, 1834.”

We have already transgressed the limits we at first proposed to ourselves, though we should wish to comment upon one or two other chapters in Mr. Cruise's work, which we shall perhaps do at a future period.

W. C. W.

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## ART. VI.—COLONIAL LAW.

*A Summary of Colonial Law, the Practice of the Court of Appeals from the Plantations, and of the Laws and their Administration in all the Colonies, with Charters of Justice, Orders in Council, &c. &c. &c.* By Charles Clark, Esq. of the Middle Temple, Barrister at Law. London. 1834.

WE take blame to ourselves for not having sooner noticed this useful book, for which not we only of the profession, but the public generally, owe a debt of gratitude to Mr. Clark. The work consists of two parts; the first, a concise and well-written treatise, defining the nature and extent of the relative jurisdictions of the colony and of the metropolis, which the author accurately describes as “A Summary of the *Laws relating to the Colonies* ;” the other, a compendious account “of the different Colonies and of their Laws, together with the Charters of Justice regulating the Administration of the Law in the Colonies to which such Charters have been granted.” It is evidently, therefore, a manual for the statesman, as well as a text-book for the lawyer; and though written certainly with no political aim, and cautiously abstaining from any expression of political opinions, it will be found to contain much valuable matters for those whom official connection or public duty may interest in the administration of the Colonies; and, indeed, who can contemplate the vastness and variety of the external dominions of Great Britain—continents and islands in all latitudes, and in both hemispheres, separated by thousands of leagues from the seat of empire and from each other, and peopled by men of all races, colours, and languages—without a deep sense of the importance of the subject which Mr. Clark has undertaken to illustrate? That the happiness of a community mainly depends on the character of its laws, and the manner in which they are administered, is a truth so well established as to have passed into a maxim; and a heavy responsibility rests on the rulers of our distant provinces, if from indifference or supineness, (for we will not suppose anything worse) radical evils or mischievous abuses are suffered to continue in either of these essential particulars. The first step to the correction of an

evil is the knowledge of its existence; and the work before us will be found especially valuable in this, that it affords a clear and comprehensive view of the internal polity and administration of every one of the dependencies of Great Britain, as actually subsisting at the period of its publication, and thereby takes away all excuse of ignorance as to what may need reformation or excision. "I am fully aware," says the author in his very sensible and modest preface, "that the chief recommendation of my labours will be, that the reader may find collected, in one volume, information for which he would otherwise have to search through many different works, some of them not very easy of access." But that the service thus rendered is no trifling one is apparent from what is presently subjoined. "The amount of information upon the administration of the law in the Colonies, to be obtained from works published in this country, is insignificant in the extreme, except in the instance of those Colonies respecting which the West India Commissioners have made and published their valuable reports. The books upon this subject published in the Colonies are not numerous; but few of them find their way to this country, and those few are only to be found in the libraries of private individuals."<sup>1</sup> The only work of which we are aware, having in any respect a common object with the one under consideration, is that of Mr. Howard on the Law of the West India Colonies; and without at all detracting from the merit of that very useful compilation, which is by no means superseded by the labours of Mr. Clark, it is sufficient to say that it is confined to the British possessions in America, and that its professed purpose is the furnishing of a ready and convenient mode of referring to certain laws in force in those possessions, then remaining in manuscript in the office of the Secretary of Colonies; whereas Mr. Clark, on the contrary, fixing his attention rather on the organic and constitutional law which appertains to all the Colonies generally and obtains in each particularly, does not attempt to furnish in detail the local laws affecting the present property of the subjects of the respective communities. A complete work of this kind would

<sup>1</sup> To the testimony here given to the value of these reports, especially those of Mr. Commissioner Dwaris, we heartily subscribe. But it would be a curious fact to ascertain, by *how many persons* they have ever been read?

be a library rather than a volume, and indeed would never be executed at all by any individual exertions, as will be apparent from certain startling facts made known in the reports of the West India Commissioners, and transferred into the pages of this work.<sup>1</sup> Thus, to select a few instances from among the islands which possess legislative assemblies—of Nevis we are told, that “there is an edition of the acts of the island from 1664 to 1740 inclusive, printed by authority of the Board of Trade, which is *scarce*,” that “there is another from 1664 up to 1774, printed by the authority of the legislature, and made evidence by an act for that purpose, which is also *scarce*,” that “there is a third from 1664 to the middle of 1818, printed by authority of the Council and Assembly; but that this is *inaccurate*.” So of St. Christopher’s, the Governor told the Commissioners that “he could not supply them with a copy of the laws; he had none for himself; *he was obliged to grope in the dark* :—a copy of the printed laws to 1779 was afterwards, with difficulty, procured, but many of the laws of the island remain in manuscript.” At Tortola, “on application for a copy of the laws, the Commissioners learnt with surprise, that in this island all the laws remained in manuscript, and were, as might be expected, many of them in an imperfect state.” Even in the important Island of Barbadoes, “the manuscript acts not in print are said to amount to 247, which are deposited in the Colonial Secretary’s office, copies being directed to be kept in the parish churches.” In Tobago “the charter of the constitution is understood to be lost,” though, by good luck, “its general nature” can be gathered “from the preamble of an act of the Assembly passed in 1794.”

In the Crown Colonies the obstacles to a compilation of the laws are even greater than these; for in order to this, it must first be known what the laws are, and that this is not a very easy matter will be sufficiently apparent from a single

<sup>1</sup> “It might have been supposed,” the author adds, “that the colonists, with a view to their own interests, would have forwarded to the library at the Colonial Office, and to the British Museum, such works as would enable any one who desired it to obtain complete and accurate information on any subject, which for the benefit of the Colonies he might wish to bring under public discussion. But such has not been the fact.” Surely this is an evil for which government ought to provide a remedy.



extract applying to the Island of Trinidad. "The Spanish laws, which are of authority in this colony, are such as were in force at the time of the capture of the island, (February, 1797,) and that have not since been repealed by His Majesty the King of England. Of these laws there are some compilations and digests, viz. what is termed the *Derecho Real de Castilla*," and about ten others with titles equally edifying. "There is no complete printed collection of the Orders in Council, Proclamations, &c. by which changes or modifications have from time to time been made in the Spanish law, though there is such a printed collection of those which have been promulgated since the administration of the government by Sir Ralph Woodford. Of the MS. proclamations of former governors, the Judge of Criminal Inquiry thought no person had a complete collection, but the Chief Justice said they were deposited in the respective offices of the authorities by which the same had been issued." Instances of the like kind might be multiplied,<sup>1</sup> but this will serve for a sample, and at all events will prevent any unreasonable expectation that, in the compass of a single volume, are to be found the particular laws of each particular settlement.

Mr. Clark has not attempted impossibilities; but that in what has been done he has rendered important service will be apparent from the following brief and imperfect analysis of the work:—In the first and main division are considered, "1. The Laws to which, in a general view, the Colonies are subject. 2. The particular legal constitutions at present prevailing in them. 3. Such Acts of the British Parliament as impose regulations on the Colonies. 4. Some miscellaneous points of English law relating to the Colonies."

Under the first of these heads the author examines the sovereignty of the parent state, executive and legislative; in order to the clear understanding of which, it is necessary to distinguish the colonial possessions from each other in reference to the manner of their acquisition. The modes of acquisition are three,—conquest, cession under treaty, and occupancy. In the two former cases the conquered or ceded country retains its former laws till they are changed by com-

<sup>1</sup> As in the case of British Guiana and Mauritius.

petent authority, and that authority resides absolutely in the crown, without regard to rights before exercised by the subjects of the conquered country: in the case of a colony acquired by occupancy which is a plantation properly so called, the law of England then in being is immediate and *ipso facto* in force in the new settlement, and such a colony is not subject to the legislation of the Crown; the subjects of Great Britain, its first inhabitants, carrying with them their own inalienable birth-right, the laws of their country. But every colony, however acquired, is subject at all times to the supreme legislative authority of the British parliament, and this even though having a legislative assembly of its own. This authority, however, is subject to the exception introduced into the well-known "Declaratory Act," by which the right of imposing internal taxes for purposes of revenue was formally renounced by the parliament of the empire. A brief review is taken of the too famous dispute between Great Britain and her North American subjects which gave occasion to that act; and to conclude this head of inquiry, some important remarks are added, as to what statutes of the imperial legislature are *ipso facto* binding on the colonies, and on which of them.

Under the second head, where the author examines the forms of constitution and government which obtain in the several colonies, the British possessions are enumerated, all of which with the exception of Sierra Leone, which is a charter government, fall within the definition given by Blackstone of *Provincial Establishments*, namely, settlements in which the governor and council are always named by the king; of these the greater part having been originally acquired by conquest and subject therefore to the legislation of the Crown, have since received constitutions comprising the power of framing laws for themselves in representative assemblies, by which the Crown has abandoned its prerogative of legislation. Three others, viz. Newfoundland, New South Wales, and Van Dieman's Land, were acquired by discovery or simple occupation, and are consequently governed by the general law of England, as it existed at the period of the acquisition, subject to such regulations as the British parliament has since specially provided for them. There are other colonies, which, having been originally acquired by conquest or cession and having

yet obtained no grant of a representative legislative assembly, are still subject to the legislation of the Crown. "These are St. Lucia, Trinidad, the newly constituted colony of British Guiana (consolidating Berbice, Demerara, and Essequibo,) the Cape of Good Hope, Mauritius, Ceylon, and the European establishments of Gibraltar, Malta, and Heligoland." The different laws prevailing in some of these colonies are as follows: In St. Lucia, the ancient code of France, as it existed before the promulgation of the Code Napoleon, is still the law of the colony. In Trinidad, the law of Spain, as it was in 1797. In British Guiana, the Cape of Good Hope, and Ceylon, the Roman Dutch law of the seven united provinces, and the Batavian republic. In Mauritius, of the five codes of Napoleon, all but the code penal,<sup>1</sup> which last, at the time of the capture, had not been promulgated. "It is to be observed, however," the author tells us, "with respect to all these colonies formerly belonging to France, to Spain, and to Holland, that the law in force in each of them, at the time of its conquest and still retained there, though formed upon the basis of the parent state, differed widely from it in many particulars. By each of these states a special system of law had been established for the government of its colonies. Thus the kings of France had promulgated or sanctioned various ordinances for their West Indian possessions, which are collected together under the title of the Code de la Martinique. The kings of Spain, with the advice of the council of the Indies, had established a body of laws, intituled, *Leyes de las Indias*, or *Recopilacion de las Indias*. The Seven United Provinces had issued separate codes for the government of their western and eastern colonies, at the suggestion of the different commercial companies, by which those colonies were settled."

In the Crown colonies, and the three before mentioned, the *local* legislature is comprised of the government and a council, by whom proclamations and ordinances are issued, subject however to the confirmation or disallowance of the king. In the more numerous class, in which representative bodies exist, the form of government is for the most part closely modelled

<sup>1</sup> In Mauritius a code penal, based upon that of France, has been since compiled, but whether yet officially promulgated we know not.

after that of England. It consists of a governor appointed by the Crown, and exercising the supreme executive authority; a council, also named by the Crown, and selected from the principal inhabitants; and a house of assembly, chosen by the freeholders as their representatives. The governor, the council, and the house of assembly have each their separate functions and privileges, which are particularly detailed in the work. The ordinances framed by the legislative body, with the concurrence of the governor and council, are called acts of assembly, and constitute the local statute law of the colony; but they are in all cases subject to disallowance or confirmation by the king in council. "All private acts, and in some instances public acts, are passed with a clause suspending their operation till the pleasure of the king be known; in that case they have of course no effect in the colony till the royal will be ascertained. But, in general, public acts are passed without a suspending clause, and when in this form they come into operation in the colony immediately on receiving the governor's assent, and so continue until notice is given there of their disallowance at home." Of the mode of allowing or disallowing colonial statutes, a minute and interesting explanation is given; and some general and important observations are made upon the prerogative of the Crown, as exercised over these colonies, and on the right of taxation. The executive and legislative administration having been examined, the judicial next comes under consideration. Some difficult questions are touched upon, as to the application to the several classes of colonies of British statutes passed since the acquisition of the crown colonies, or the granting of constitutions to the others; and the jurisdiction of the several courts, and the mode of administering the law, are stated as applicable to the greater part, though subject of course to variation and exception in particular cases.

The third head of inquiry comprehends such acts of the British parliament as impose regulations on the colonies in general. Of these the principal are those laws which the mother country has thought it expedient to adopt either for maintaining her maritime and commercial ascendancy, or for purposes of revenue by the imposition of duties on importation. Such are the navigation act, of which a summary is

given, the customs, warehousing and register acts, the act for the prevention of smuggling, and that for the regulation of the trade of the British possessions abroad. There are a few others, expressly or by their generality, applicable to the colonies, the titles and principal provisions of which are specified.

Under the fourth head are considered some points of law upon matters relating to the colonies; as, first, of what acts done in a colony the courts of England can take cognizance. Crimes are local and can be tried only where committed, unless specially provided otherwise by statute: so with respect to trespasses and other injuries to *real property*; though in an elaborate note, well worthy of attention, the author questions the propriety of this latter rule; but *personal* injuries and breaches of contract, being in their nature transitory, are cognizable before the tribunals of this country. Some other points of minor importance are noticed, as the construction of contracts made abroad; the efficacy of a colonial judgment when sought to be enforced in England; the effect of a colonial certificate in bankruptcy as a bar to an action of debt brought in the courts here; the evidence required in these courts as to colonial transactions; the proof of colonial law; and, lastly, the effect of an English probate or grant of administration on property in the colonies.

The several heads of inquiry being thus exhausted, the author devotes a separate section to the important subject of appeals in the last resort from the courts of the colony to his majesty in council. Our readers are aware that by a most beneficial statute passed two or three years ago (3 & 4 W. IV. c. 41,) a committee of the privy council, called "the Judicial Committee of the Privy Council," is appointed for hearing appeals from the plantations, &c., and that this body, as now constituted, forms an efficient, and as far as the nature and variety of the matters submitted to them will admit, a competent tribunal for the final determination of these costly and protracted suits.<sup>1</sup>

<sup>1</sup> Those who had experience of the privy council as a court of justice before the re-organization, know how to appreciate the benefit of the change. There is no precipitate rushing to a conclusion, no overweening and conceited confidence in first impressions, such as has been witnessed there. Questions presenting to an English

It was probably the attendance of the author as a reporter of the decisions of this high court, which first suggested to him the want of such a publication as the present, and certainly the practitioners there are above all others indebted to him for the manner in which the want has been supplied. After taking a brief view of the nature and origin of appeals to the king in council, the work proceeds to consider the manner in which parties must proceed in appealing from the decision of a colonial tribunal. Information is furnished for the guidance of the suitor through every stage of the process, and the practice of the court, and the effect of its orders and judgments are concisely and explicitly stated.

With this summary ends the first, and what, we suppose, must be considered the main portion of the work. The rest consists of an appendix, which however is something like the postscript of a lady's letter, being about eight times the bulk of the principal to which it is accessory. For this seemingly odd arrangement Mr. Clark thus accounts in his preface. "It was at first proposed to print the accounts of the colonies as a second chapter, and to add the charters of justice and other similar documents by way of appendix; but I conceived that it would be more convenient for the reader to find every thing relating to any one colony in the same portion of the book, and I therefore omitted the division of a second chapter, and threw the whole into the form of an appendix. In consequence of

lawyer points of novelty, and consequently of difficulty, are patiently investigated and decided on mature and cautious deliberation. The necessity of this caution is every day exemplified in the proceedings of that court. A remarkable instance fell under the personal cognizance of the writer. A question was agitated before the judicial committee, upon which depended a claim for at least 30, or 40,000*l*. It was a question of civil status, viz., whether the appellant, by the law of France, was at a particular period a French subject. He had served in the armies of France and held civil and military rank under the French crown. One of the learned judges, looking into Merlius, found what seemed to be a case in point, deciding that under such circumstances he was entitled to the rights of citizenship, and became a French subject. Had the judgment been pronounced immediately, there is no doubt that the court must have yielded to so direct an authority. Yet on looking further into the same author, and under another head, it was discovered that the case and opinion before given had been repudiated by the French courts and lawyers generally, and upon a consultation of an eminent French barrister it was treated as unquestionably not law. The judgment, therefore, when delivered after an interval of some days, was that the claimant was not a French subject, and he consequently succeeded.

this arrangement the appendix occupies by far the largest portion of the volume ; and though this may be objectionable in some respects, it has the recommendation of affording a facility of reference, to which, especially in a law book, I thought some less important objects might well be sacrificed."

The appendix then, or second portion of the work, contains a detailed account of the several forms of government and the administration of the laws in each of the colonies successively ; a brief notice being at the same time incidentally taken of their history and condition, and of some of the principal laws at present prevailing in them. Thus to take the instance of Antigua, which first presents itself, there is—1st, A description of the island ; 2dly, A summary of its history and constitution ; 3dly, An account of its several courts of justice, civil and criminal ; 4thly, Of its magistracy generally ; 5thly, Of its collection of laws ; and—6thly, Of the general laws prevailing in the island. The same matter is to be found, though not always with the same arrangement, as applicable to each of the other colonies in succession.<sup>1</sup> Under the head of British Guiana there is moreover given at full length the commission of Sir Benjamin D'Urban, as Governor and Commander-in-chief, dated the 31st March, 1831, and copies of the orders in council of the 22d April and 20th June, 1831, for the administration of justice in British Guiana, Trinidad, and St. Lucia. To the account of Newfoundland also there is appended at full length the charter of justice, dated the 19th September, 1825, by which its courts are constituted and administered, together with the instructions to the governor and a royal proclamation issued on the 26th July, 1832, containing the grant of a legislative assembly, and defining its powers and those of the governor with relation to the courts already established by the charter. In like manner the charters of justice granted to the Cape of Good Hope, Ceylon, Mauritius and Sierra Leone, are set out in full ; and these

<sup>1</sup> A description given by Mr. Clark of one of the acts of assembly of the Island of Montserrat is too good to be passed over. After reciting that opprobrious language, " if not prevented may overshadow the good government and administration of justice in this island with the staple clouds of reproach and infamy," it proceeds to prohibit such language generally, and the following nick names in particular—" Tory—English or Irish, or Scotch Dog," &c.

documents, in our judgments, greatly enhance the value of the work, inasmuch as they are not to be found in any other publication, and were not without difficulty procured for this.<sup>1</sup>

Having thus given a sketch, necessarily very imperfect, of the matter and plan of Mr. Clark's book, we shall merely add that the style is easy and perspicuous, and the execution, notwithstanding some marks of carelessness in the way of occasional repetition to be found in the appendix, creditable to the talents and diligence of the author. We learn with pleasure that "A Summary of the Laws governing our East Indian Possessions," will form an additional volume to the present, and we sincerely hope that the public will so appreciate the volume already offered, as to quicken and cheer the labour which must necessarily be bestowed in the preparation of the other.

We cannot, however, dismiss the subject itself, without some reflections which have been suggested to us partly by the perusal of this work, and partly by facts which have fallen under our own observation. And, first, we beg respectfully to ask, whether after the disclosures made by the West India Commissioners in their admirable reports, and with the knowledge which the government must have of the state of the law in the other colonies, it is not its bounden duty to take immediate measures for remedying so serious an evil? Take the case of any crown colony—say, for example, that of Trinidad or St. Lucia. The law consists in the one of a modification of the general law of Spain as existing in 1797, and in the other of the law of France as it chanced to be in 1803, together with such variations as have been since those periods respectively introduced, not only by statutes of the British parliament, but by orders in council, commissions and instructions to governors, proclamations and local ordinances, not one half of which exist in any accessible shape, and which of course to the inhabitants themselves are for the most part utterly unknown. Can any injustice be more crying than this? How are the laws to be administered or obeyed, which are to be sought for on the shelves of some collector of scarce

<sup>1</sup> We know scarcely a greater reflection on the administration of the colonies in England than the obstacles which Mr. Clark experienced in procuring authentic information, and of which he has, with characteristic modesty, suppressed all complaint.



and curious books, or are embodied only in parchment or paper manuscripts, preserved, if at all, in some government depository, and to be perused only on payment of a fee. Gentlemen are sent out from England to preside as judges in the courts of these islands, and to determine controversies upon rights prescribed by laws of which they are, and, except for such traditionary and empirical knowledge as may be acquired by long residence, must of necessity continue to be, profoundly ignorant. Hence mistakes, which are in effect injustice; hence discontent and disaffection in the colony. The colonist, smarting under the soreness of an adverse judgment, which he has reason to believe erroneous, appeals to his sovereign in England, by whom the matter is referred to the decision of the judicial committee of his privy council. But who shall guarantee the suitor against error even in this high tribunal? To whom and where shall his judges apply for accurate information? from what source are they to derive the knowledge which shall enable them to decide according to law? What and where is the law?

The evil then is apparent, and is not the remedy equally so? Let the bench and leading members of the bar in each colony be authorized by the government to frame a digest of the laws, as they conceive them actually to be: let them add such suggestions as occur to them for their amendment. Let all acts of assembly, all ordinances, proclamations, orders in council, commissions and instructions, now in force in each of the colonies respectively, be collected and printed in the order of their dates. Let the whole be then transmitted to England, and subjected to the revision of a board, composed partly of eminent English lawyers, partly of retired colonial judges or practitioners, and partly of gentlemen in the Colonial Office, or others whom official connection has rendered familiar with the administration of the colonies. Let the codes ultimately framed receive the sanction of law either by statutes of the Imperial Parliament, or in any other manner which will equally effect the object. In this way, by a judicious distribution of parts and the appointment of fit persons, without regard to patronage or favour (if such a thing can ever be), might be achieved, in very few years, a work which, for solid usefulness, would bear an advantageous comparison with any

which either has been or can be executed by the rulers of a mighty empire.

One other topic, and we have done. Mr. Clark, in his preface, alludes to a question of great and general importance. Many of our colonial possessions having passed into our hands by conquest, are peopled by inhabitants of a different race. By the fact of conquest and the subsequent ceremony of an oath of allegiance, those who were inhabitants at the time of conquest become, to all intents and purposes, subjects of Great Britain. But as the transfer of allegiance effects no change in the manners of the people, others of their former country still naturally come to settle among them. The policy of this, and of every other metropolitan state, encourages such immigration, adding, as of course it does, to the strength and riches of the colony. But these new settlers, born out of the allegiance of the crown and not transferred by conquest, are not British subjects, and can never become so but by an act of the Imperial Parliament, or by letters of denization from the crown. Suppose then the following case: that a Frenchman of irreproachable character, and of good family and education, had for some reason thought fit to take up his abode in one of our French colonies, as Mauritius—had connected himself with the place by ties of kindred—had purchased lands, and founded extensive establishments of commerce and manufactures—had formally taken the oath of allegiance—had filled various civil offices with the knowledge and recognition of the local authorities—had discharged every kind of civil and social duties, and thus lived in reputation and usefulness in the country of his adoption for a period, say, of twenty years. Now what, at the expiration of that time, would be the civil *status* of such a resident? A British subject confessedly he is not; but has he therefore no civil rights, no recognized and established footing in the colony? Is he a mere alien and sojourner, residing only by toleration, and not adopted into the community to which he has attached himself? Can the *local* government confer upon him any and what rights of citizenship? and by what acts of positive ordinance or of implicit recognition may such a power, if it exists, be exercised? These are grave and interesting questions. Mr. Clark has answered some of them in a way

which, we conceive, will be found satisfactory. The king, it is true, cannot communicate to another his prerogative of making denizens; the colonial government therefore, whether representative or not, cannot, by its own act, confer the privileges of a British subject; but the power of granting a right of citizenship, to be enjoyed within the limits of the colony, the colonial representative governments have, in more than one instance, exercised. Two acts of assembly, one in Jamaica, the other in Antigua, both confirmed at home, are cited by Mr. Clark in confirmation of this doctrine; and if the local legislature of the representative colonies may do this, why not, he correctly reasons, that of the crown colonies also? It results therefore that in the case above supposed the governor and council of Mauritius might give to the settler the rights of a Mauritian citizen, though not of a British subject. The other question remains unanswered. Is the governor's recognition of, or acquiescence in the public exercise of such rights for any period, however long, equivalent to a positive and formal grant of them? If not, can the governor in his council, by a mere effort of arbitrary will, without proved offence and without a trial, banish a person so circumstanced as the one we have supposed, from his home, his family, and his possessions, and send him forth an outcast and a wanderer on the earth? The ready answer, we know, will be, that the supposition is absurd—the case impossible—that no governor would so act—that no man, but by his own gross misconduct, could be plunged into such utter wretchedness. To this we have but one reply, which is, that *the case has happened*,—that the alleged ground of deportation was an act of which, it is now admitted, the victim was not guilty, and that the sentence itself was the result of a misapprehension on the part of some of the authorities, and it is to be feared of a less pardonable feeling on that of others. The legal power of the governor to decree and enforce a sentence of deportation, under such circumstances, may possibly be doubtful as a question of law, but if it be so, surely the doubt ought to be at once and for ever extinguished by an act of the legislature, declaring that every settler in any of his majesty's colonial possessions, not being a British subject, who, after a certain period of permanent residence (say five or seven years), shall be admitted to

take the oath of allegiance, shall henceforth be deemed to be a subject of his majesty, and shall have and enjoy all the rights and privileges of such subject, within the limits of such possession, and not otherwise or elsewhere. Policy, justice, consistency, demand such an enactment. What has happened once, may happen again; and it would be a lasting reproach on the character of Great Britain if, after establishing and maintaining freedom at home, she suffered the delegates of her sovereignty to play the tyrant in her colonies.

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## DIGEST OF CASES.

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### COMMON LAW.

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[Comprising Adolphus & Ellis, Vol. 1, Part 4, and Vol. 2, Part 1; Bingham's New Cases, Vol. 1, Part 4, and Vol. 2, Part 1; 1 Scott, Parts 2 and 3; 1 Crompton, Meeson, & Roscoe, Part 5; 5 Tyrwhitt, Parts 1 and 2; 3 Dowling's Practice Cases, Part 5:—all Cases included in former Digests being omitted.—5 Manning & Ryland, Part 2, recently published, contains no case not before digested.]

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ACCORD AND SATISFACTION. See PLEADING, 10.

#### AFFIDAVIT.

1. (*Entitling of.*) An affidavit, entitled "G. S. v. W. C. the elder, sued as W. C."—the cause being G. S. against W. C.,—was rejected.—*Shrimpton v. Carter*, 3 D. P. C. 648.
2. (*Taking off the file.*) The Court will not allow an affidavit to be taken off the file to be amended: a fresh one must be sworn.—*Plant v. Butterworth*, 5 Tyrw. 183.
3. (*Alteration of jurat.*) The Court set aside a judge's order for better particulars of set-off, on the ground that the plaintiff's attorney's clerk had, without authority, altered the date of the jurat of the affidavit on which the order had been obtained.—*Finnerty v. Smith*, 1 Bing. N. C. 649.

#### AFFIDAVIT TO HOLD TO BAIL.

1. (*On bill of exchange.*) An affidavit of debt on a bill of exchange must state the amount of the bill; if it does not, the bail-bond will be set aside, with costs.—*Molineux v. Dorman*, 3 D. P. C. 662.
2. After a rule *nisi* had been obtained for cancelling a bail-bond, on the ground of a defect in the affidavit of debt, the plaintiff offered to consent to a judge's order to the same effect, the costs to be the costs in the cause, and no action to be brought; but he did not offer to pay the costs of the rule: Held, that, notwithstanding this offer, the defendant was entitled to have his rule made absolute with costs.—*Clarke v. Crockford*, 3 D. P. C. 693.
3. (*On bill of exchange.*) In an action by the indorsee of a bill against the drawer, the affidavit of debt alleged that the defendant was indebted to the plaintiff on the bill (which was overdue), "and which sum still remained

due and owing" to the plaintiff; but it omitted to aver either presentment or notice: Held bad. (7 Bing. 251; 1 D. P. C. 211, 445.)—*Simpson v. Dick*, 3 D. P. C. 731.

4. (*In covenant.*) Affidavit, that defendant is indebted in the sum of 500*l.* upon and by virtue of a mortgage-deed, by which the defendant covenanted to pay the said sum at a day now past: Held sufficient, without an averment that the money was not paid at the day.—*Masters v. Billing*, 3 D. P. C. 751.

#### AGREEMENT.

- (*Running with the land.*) An agreement that plaintiff should be paid 360*l.* on the 31st December, 1834, for 313*l.* lent by him on the 26th April, 1834, if four persons named should be alive on the 31st December, and that the plaintiff should have the use of two boxes at a theatre in the intermediate time gratuitously, but if either of the four persons should die, the plaintiff should pay a reasonable sum for the use of the boxes: Held not to be an agreement running with the land, and therefore not binding, as to the use of the boxes, on an assignee of the theatre.—*Flight v. Glossop*, 2 Bing. N. C. 125.

#### AMENDMENT.

1. (*At what stage allowed.*) The Court allowed a defendant to amend his plea after judgment against him on demurrer, on an affidavit that material facts had come to his knowledge since such judgment.—*Atkinson v. Baynton*, 1 Bing. N. C. 740.
2. (*In debt on recognizance of bail.*) In debt on a recognizance of bail, the declaration stated the recognizance to have been entered into in an action of debt against J. S. On the production of the record, (on a plea of nul tiel record,) it appeared that the original action was on promises. The Court allowed the declaration to be amended on payment of costs, but required a special application for that purpose.—*Munkenbeck v. Bushnell*, 1 Scott, 569.

And see PRACTICE, 25.

#### ANNUITY.

- (*Memorial.*) The memorial of an annuity was held sufficient, notwithstanding the omission of the word *life* in the heading, "Person for whose life the annuity is granted."—*Flight v. Lord Lake*, 2 Bing. N. C. 74.

And see BANKRUPTCY, 5.

#### ARBITRATION.

1. (*Extent of arbitrator's authority.*) It was referred to an arbitrator to decide on what terms a partnership agreement should be cancelled. He directed, among other things, that the agreement should be cancelled, that one of the partners should have all the debts due to the firm, and should, if necessary, sue for them in the name of his late partner: Held, that in this last direction the arbitrator had not exceeded his authority.—*Burton v. Wigley*, 1 Bing. N. C. 665.
2. On a reference of a cause and all matters in difference, the arbitrator

awarded that there was a balance of 26*l.* due from the plaintiff to the defendant, but did not direct the money to be paid. The Court refused to grant an attachment for non-payment of the money. (3 Bing. 634; 1 D. P. C. 489.)—*Hopkins v. Davies*, 1 C., M. & R. 846.

3. (*Revocation of arbitrator's authority—Arbitrator's misconduct.*) An arbitrator's authority cannot be revoked after he has made his award.

His refusal to examine witnesses is sufficient misconduct to induce the Court to set aside his award; although he did it thinking he had sufficient evidence without them.—*Phipps v. Ingram*, 3 D. P. C. 669.

4. A cause was referred at the assizes, and by consent a verdict was entered for the plaintiff, damages £50, subject to the award of an arbitrator. The time for making the award expired without an award being made; it was further enlarged by consent, and the enlarged time having also expired without an award made, the plaintiff gave notice of trial, and proceeded to the trial of the cause, and obtained a verdict. A judge's order having been previously obtained for altering the record in the distringas, the clerk of assize at the trial erased the indorsement of the previous verdict, and entered the new verdict in the usual way. The Court set aside the latter verdict for irregularity.—*Evans v. Davies*, 3 D. P. C. 786.

5. (*Costs.*) An action for a nuisance (to which a plea of the general issue only was pleaded before the new rules of pleading,) was referred to an arbitrator, who found that the plaintiff had not proved that the defendant was the cause of the injury, and ordered a nonsuit to be entered; but directed also, that the defendant should remove the nuisance within a month: Held, that this was a finding substantially in favour of the defendant, and that he was entitled to the expense of all witnesses who could be material under the general issue.—*Radcliffe v. Hall*, 3 D. P. C. 802.

#### ARREST.

1. A defendant who had been wrongfully arrested on a Sunday upon a charge of felony, without any warrant, was arrested on civil process as he was leaving the police-office after being discharged by the magistrate: Held, that the latter arrest was regular; it not being distinctly shown that the plaintiff was privy to the unlawful arrest.—*Jacobs v. Jacobs*, 3 D. P. C. 675.
2. To induce the Court to discharge a defendant from arrest on the ground of no debt being due, the circumstances must be exceedingly strong to show that the arrest is an abuse of the process of the Court.—*Tucker v. Tucker*, 1 Scott, 463.

#### ATTORNEY.

1. (*Taxation of bill.*) A charge for searching for judgments will not render an attorney's bill taxable under 2 G. 2, c. 23. (5 B. & Ald. 400; R. & M. 262.)—*Ex parte Bowles's Trustees*, 1 Bing. N. C. 632.
2. (*Entering name on roll nunc pro tunc—Penal action against.*) The Court refused to enter the name of an attorney (which through inadvertence had not been inserted on the roll) *nunc pro tunc*, in order to defeat an action for penalties incurred by the omission. But in such action they

also refused to allow the plaintiff to amend after special demurrer.—*Exp. Swift*, 1 Bing. N. C. 734; *Matthews v. Swift*, *ib.* 735.

3. (*Pleadings in action by—Non delivery of bill.*) Where the defendant in an action on an attorney's bill was let in to plead on an affidavit of merits, after suffering judgment by default, he was not allowed to plead that no bill was delivered pursuant to the statute.—*Beck v. Mordant*, 2 Bing. N. C. 140.
4. Where the plaintiff's attorney, after he had ceased to act for the plaintiff, entered into the service of the defendant, and caused the under-sheriff to return in a *fi. fa.* a sum as levied for the plaintiff greater than had in fact come to the plaintiff's hands, the Court directed the return to be amended according to the fact.—*Green v. Glassbrook*, 2 Bing. N. C. 143.
5. (*Costs of taxation of bill.*) Where a judge's order allowing an attorney the costs of taxation of his bill, although more than a sixth was taken off, had been made a rule of Court, and an attachment obtained upon it, it was held too late to apply to rescind the order.—*Thompson v. Carter*, 3 D. P. C. 657.
6. (*Right of attorney to go on with action for his costs.*) An attorney is not justified in proceeding with an action after it has been settled between the parties themselves, although the defendant knew that costs had been incurred, and that the plaintiff himself was not in a condition to pay them: it must be shown affirmatively that the settlement was come to for the purpose of cheating the attorney.—*Jordan v. Hunt*, 3 D. P. C. 666.
7. (*Costs of taxation of bill.*) Where, on the taxation of an attorney's bill, a sum was deducted, being the costs occasioned by commencing an action in an improper form, which was afterwards brought in a proper form; and in consequence of that deduction a little more than a sixth was taxed off: Held, that the client was entitled to the costs of taxation. (2 H. Bla. 358; 3 N. & M. 767; 5 B. & C. 760; 1 D. P. C. 251; 2 D. P. C. 382.) —*Morris v. Parkinson*, 3 D. P. C. 744.
8. (*Liability of, for negligence.*) Where a plaintiff was nonsuited through the neglect of the attorney's clerk to attend in Court, the Court refused to set aside the nonsuit except on the terms of the plaintiff's attorney paying the costs occasioned by the defendant's attending to try.—*White v. Sandall*, 3 D. P. C. 798.

And see *Costs*, 6.

#### BAIL.

1. (*Affidavit of justification.*) Country bail stating himself to be a house-keeper at a place named, but not that he was *resident* there, allowed without costs.—*Batley v. Heald*, 5 Tyr. 231.
2. The days between Thursday next before and Wednesday next after Easter-day, are not to be reckoned in notices of justification of bail.—*Cumming v. Pullen*, 1 Scott, 539.
3. (*Affidavit of justification.*) An affidavit of justification, which stated that the property of the bail consisted of household furniture and effects,



held not to be sufficient, without stating specifically *where* the property was. (1 D. P. C. 368.)—*Cooper's bail*, 3 D. P. C. 692.

4. (*Same—Notice of justification—Costs.*) The notice of justification omitted to state where the bail had resided for the last six months, or whether they were householders or freeholders; but the affidavit of justification was correct in those points: Held, that this did not cure the defect in the notice. The costs of opposition were however refused.

A notice to justify at eleven, all parties appearing at ten, held sufficient.—*Beal's bail*, 3 D. P. C. 708.

#### BANKRUPTCY.

1. The case of *Carvalho v. Burn* (4 B. & Ad. 382, 11 L. M. 189,) was affirmed on error by the Exchequer Chamber.—*Burn v. Carvalho*, 1 Ad. & E. 883.
2. (*Evidence—Declarations of Bankrupt.*) A trader in embarrassed circumstances absented himself from his house from February 16 to March 9. On an issue, whether he had committed an act of bankruptcy on or before 5th March, two letters written by him on the 16th January, asking for time on two bills payable by him in February, were held admissible in evidence to show the cause of his absence.—*Smith v. Cramer*, 1 Bing. N. C. 586.
3. (*Mutual credit.*) In an action by the assignees of a bankrupt for not accepting, pursuant to agreement, a bill of exchange drawn by way of part payment for goods sold and delivered by the bankrupt to the defendant: Held, that the defendant might set off a debt due to him from the bankrupt for money lent, &c. (1 Mod. 215; 2 Vern. 117; 8 Taunt. 499; 1 B. & Ad. 526; 2 B. & B. 94.)—*Gibson v. Bell*, 1 Bing. N. C. 743.
4. (*Set-off, against assignees, of debt due from bankrupt.*) To a declaration in debt by assignees of a bankrupt for money had and received to the use of the plaintiff as assignee, the defendant pleaded that the bankrupt before his bankruptcy was indebted to the defendant to a greater amount, on an account stated between them, and that he was willing to allow the plaintiffs to set off against such debt the debt claimed by the declaration: Held, ill. (Cowp. 133.)—*Groom v. Mealey*, 2 Bing. N. C. 138.
5. (*Annuity, when proveable under fiat.*) The instalments of an annuity, for the payment of which a bankrupt is a surety only, and which he covenants to pay in case of default by the grantor, are not, where they become due after his bankruptcy, proveable under a fiat against the surety. (4 Bing. 209; 1 B. & Ald. 491; 3 B. & Ald. 521; Mont. & Bl. 229. See Mont. & Bligh, 219, S. C.)—*Thompson v. Thompson*, 2 Bing. N. C. 168.

#### BILL OF EXCHANGE.

1. (*Proof of notice of dishonour.*) An entry of the dishonour of a bill, made in the usual course of business by a notary's clerk, who presented the bill, at the time of the dishonour, was held good evidence in an action on the bill, on proof of the clerk's death. (3 B. & Ad. 890.)—*Poole v. Dicas*, 1 Bing. N. C. 649.

2. (*Usage of bill-brokers—Title acquired by transfer of bill bonâ fide.*) W. & P., brokers in London, had in their possession bills of different customers to the amount of nearly 3000*l.*, which had been left with them to raise money on. They mixed these bills with others of their own to about the same amount, and deposited the whole with F., a merchant and capitalist, for an advance of 3000*l.* then made, and for a preceding advance made a few days before on a promise to bring bills. Evidence was given that it was usual and customary for bill-brokers in London to raise money by a deposit of their customers' bills in a mass, and that the bill-broker alone was looked to by the customers who gave him dominion over the bill.

In an action brought by F. on one of the bills against one of the customers who was a party to the bill, the judge left it to the jury to say whether F. the plaintiff took the bill from W. & P., the bill-brokers, with due care and caution, and in the ordinary course of business; and the jury, being of opinion that he had so taken it, found for the plaintiff: Held, that the defendant, the customer, could not complain of this summing up, and the Court refused to disturb the verdict.

Another of the customers (who was himself also a bill-broker) sued F. in trover for the value of certain of the bills. The judge directed the jury that the principle laid down in *Haynes v. Foster*, (2 C. & M. 237),—that a bill-broker who receives a bill from a customer to procure it to be discounted has no right to mix it with bills of other customers, and to pledge the whole mass as a security for advances to himself, and that still less has he a right to deposit such bills as a security for money previously due from him,—was to be taken by them as the general law; but that, notwithstanding such general law, the parties might contract as they thought proper; and he left it to the jury to say whether the usage set up by the defendant was established to their satisfaction, and, if so, whether they thought the plaintiff, who was a bill-broker himself, had contracted with reference to that usage: and the jury having found for the defendant, the Court refused to disturb the verdict.

A bill-broker is not a person known to the law with certain prescribed duties; his employment is one depending entirely on the course of dealing; his duties may vary in different places, and their extent is a question of fact, to be determined by the usage and course of dealing in the particular place.

*Semble*, that the established rule of law,—“that the holder of bills indorsed in blank, or other negotiable securities transferable by delivery, can give a title which he does not himself possess to a person taking them *bonâ fide* for value,”—is not to be qualified by treating it as essential that the transferee should take them with due care and caution, unless his conduct be such as to affect the *bona fides* and honesty of the transaction itself. (3 N. & M. 188, 257.)—*Foster v. Pearson*, and *Stephens v. Foster*, 1 C., M. & R. 849.

And see PLEADING, 4.

## COLLECTOR OF TAXES.

The sale of a tax-collector's lands and goods is not a condition precedent to putting in suit a bond against a surety under 43 G. 3, c. 99, for the due performance of the collector's duties; at all events, not unless the obligees have notice where to find the collector's property. (Held in the Exchequer Chamber, by five judges against two.)

Payment, to the account of a given year, of sums collected for a *different* year, is no discharge of the demand against the collector in respect of those sums.

It is no objection that the bond is conditioned for payment by the collector to the receiver-general *and* to the commissioners; or that it is conditioned for payment at the time by the act appointed. (2 B. & A. 431.)  
— *Gwynne v. Burnell*, 2 Bing. C. P. 7.

## COMMON.

(*Evidence in support of lord's right to waste.*) On a question whether a piece of waste land, between a highway and inclosures, belonged to the plaintiff, the owner of the adjoining inclosure, or to the lord of the manor: Held, that the lord might give evidence of grants made by him of the waste between the same highway and the inclosures of other persons, although at a distance from the spot claimed by the plaintiff.—*Doe d. Barrett v. Kemp*, 2 Bing. N. C. 102.

COPYHOLD.—See DEVISE, 6; INSOLVENT.

## COSTS.

1. (*Payment into Court—Plea of payment.*) On a declaration of two counts, the defendant paid into Court enough to cover the demand in the first, and obtained a verdict on the second; but having omitted to plead the payment, as required by the new rules: Held, that he was not entitled to costs.—*Adlard v. Booth*, 1 Bing. N. C. 693.
2. (*Under 43 G. 3, c. 46.*) The plaintiff had contracted to do the iron work of two houses for the defendant, at certain fixed prices; he afterwards did two more without any express agreement. He arrested the defendant for 65*l*, the cost of the work done on the four according to measure and value, but recovered only 44*l*, the amount of all the work according to the terms of contract for the two. The defendant was held entitled to his costs.—*Bradley v. Milnes*, 1 Bing. N. C. 738.
3. (*Under 43 G. 3, c. 46.*) The defendant was arrested for 20*l*. 2*s*.; the plaintiff at the trial failed to establish a reasonable ground for proceeding for more than 19*l*. 17*s*., but he was taken by surprise on the objection to his claim for the remaining 5*s*. The Court refused to tax the defendant his costs under 43 G. 3, c. 46.—*Mantell v. Southall*, 2 Bing. N. C. 74.
4. (*On several issues.*) Before the issue was made up, the cause was referred, costs to abide the event. The arbitrator awarded that the plaintiff had sustained damage to a certain amount on one of the breaches of covenant specified in his particular; and as to the rest, that he had no cause of action: Held, that the defendant was entitled, under rule 74 of Hilary

Term, 2 W. 4, to the costs of the issue found for him, notwithstanding the cause was not in strictness *at issue*.—*Daubuz v. Rickman*, 1 Scott, 564.

5. (*On writ of inquiry*.) After judgment by default, and writ of inquiry executed, the Court on application ordered a new inquiry, on the ground that, as to part of the damages found, there was no evidence to warrant the finding of the jury; the defendant, however, in order to save the expense of a second inquiry, paid the plaintiff the whole of his demand: Held, that, notwithstanding, the plaintiff was not entitled to the costs of the inquiry. (2 B. & Ald. 317; 5 B. & C. 458; 3 D. P. C. 72.)—*Porter v. Cooper*, 3 D. P. C. 662.
6. (*On several issues found different ways.—Attorney's lien*.) In an action on the case containing several counts in the declaration, some issues were found for the plaintiff and some for the defendant: Held, that the Master was right in deducting the costs of the defendant's issues from the plaintiff's, and that the lien of the plaintiff's attorney was only on the balance coming to the plaintiff.—*Eades v. Everatt*, 3 D. P. C. 687.
7. (*Under 43 G. 3, c. 46*.) The defendant was arrested for 20*l.*, and the plaintiff recovered only 8*l.*; but it appeared that the price of the goods for which the action was brought had been agreed upon in writing, which the plaintiff by accident was unable to prove at the trial, and there was contradictory evidence as to the value of the goods: Held, that the defendant was not entitled to costs under the 43 G. 3, c. 46.—*Shatwell v. Barlow*, 3 D. P. C. 709.
8. (*Under 43 Geo. 3, c. 46*.) Two defendants having been arrested for 45*l.*, the plaintiff at the trial recovered only 21*l.* Part of the demand was for a sum of 19*l.*, which a witness stated he had seen paid on a particular day, and a receipt was put in from which it appeared to have been paid on a former day. The jury disallowed that sum, and also made a small deduction from the other part of the plaintiff's claim. The defendants, however, did not deny that the whole debt was due, and the plaintiff positively swore that it was. The Court refused to allow the defendant his costs under the statute.—*Smith v. Smith*, 3 D. P. C. 783.
9. (*Certificate to give costs in slander*.) A judge has no power, under 22 & 23 Car. 2, c. 9, to certify to give costs in a case of slander of the plaintiff in his profession, no special damage being laid.—*Goodull v. Ensell*, 3 D. P. C. 743.
10. (*Of several defendants in trespass*.) Where several defendants are sued in trespass, and a verdict is found for the plaintiff on some of the issues against some of the defendants, and against him on all the other issues, the plaintiff is entitled to the balance only of the costs, after deducting all the costs of all the defendants.

Where there are several defendants, and one alone employs an attorney for all, the others are not entitled to claim any costs.—*Starling v. Cozens*, 3 D. P. C. 782.

11. In an action to recover a sum of 8*l.* (as claimed by the particulars of demand) the defendant paid 1*l.* 18*s.* into Court under rule 19 of H. T. 4 W. 4, which the plaintiff took out in full satisfaction of the action. The cause of action arose, and both parties lived, within the jurisdiction of the county court of Cardiganshire; and by a judge's order the defendant was allowed to enter a suggestion on the roll of these facts, and that the action was brought for a sum of 40*s.*, and further proceedings were stayed, with the view of depriving the plaintiff of his costs; but the Court set aside the order, on account of the terms of the rule for paying money into Court, the lateness of the application, and its not clearly appearing that the action was brought for less than 40*s.*—*Farrant v. Morgan*, 3 D. P. C. 792.

#### COVENANT.

- (*For quiet enjoyment by underlessee.*) A lessee covenanted with his underlessee, paying rent, &c. that he should have quiet enjoyment of a term upon an underlease to commence in 1836. The lessee having forfeited his own term by nonpayment of rent to the superior landlord, the underlessee could not come into possession of the term to commence in 1836: Held, that the underlessee could not sue on the covenant for quiet enjoyment; at all events not before 1836.—*Ireland v. Birchan*, 2 Bing. N. C. 90.

#### CROWN.

- (*Adverse possession against—Conveyance of crown wastes.*) The conveyance of a manor with the appurtenances, by the commissioners of woods and forests, on the part of the crown, under 57 Geo. 3, c. 97, s. 4, does not entitle the purchaser to maintain ejectment against the possessor of land inclosed from the waste of the manor, without leave of the crown, more than 20 years before the conveyance. For the crown after that period has only the right to file an information of intrusion, which right cannot pass by such a conveyance. (21 Jac. 1, c. 14; 32 H. 8, c. 9; 3 Leon. 128; 9 Rep. 95.)—*Doe d. Watt v. Morriss*, 2 Bing. N. C. 189.

#### DEVISE.

- (*Devise to lawful heir.*) T. J. Selby, who had no relations of his own name, devised his estates to "his right and lawful heir at law," (for whom he directed advertisements to be published,) charged with legacies, to be paid in twelve months after testator's death; and if no heir was found, he devised to W. L., on condition that he changed his name to Selby. The testator had several relations on the side of his mother and grandmother, and left them large legacies. Held, that by his *lawful heir* he meant an heir of the blood of the Selbys; and that none such being found, the estates went to W. L. (*Davies v. Lowndes*, 1 Bing. N. C. 597.)—*Doe d. Wells v. Lowndes*, ib. 620, 622.
- Devise to testator's children, and their lawful issue, in tail general, with benefit of survivorship among the issue, as tenants in common: Held, that the children took estates for life, and the grandchildren contingent remainders in tail general; inasmuch as it appeared from the whole will that the testator had used the word *issue* of children as synonymous with sons or

daughters of children. (7 Ves. 522; 1 Madd. 381.)—*Cursham v. Newland*, 2 Bing. N. C. 58.

3. (*To trustees, what gives the fee.*) Devise to trustees, and the survivor and his heirs, upon trust to the use of testator's nephews and their assigns, during their lives and the life of the longest liver of them; and after determination of those estates by forfeiture or otherwise, upon trust to preserve uses, but to suffer the nephews to take the rents for their own use; and after the decease of the nephews, to the use of their children; and if only one child, to such child and his heirs; but if there should be no child, or if, there being children, they should all die in the life-time of the nephews without issue, then to the trustees and their heirs, on the like trusts as directed with respect to testator's residuary estate: Held, that the trustees took a fee.—*Cursham v. Newland*, 2 Bing. N. C. 64.
4. (*Disclaimer of.*) A devisee in fee may disclaim the devised estate by deed, and after the disclaimer has no interest in the estate. (3 B. & A. 31; 2 Swanst. 365, 371.)—*Begbie v. Crook*, 2 Bing. N. C. 70.
5. (*Executory devise of leaseholds.*) Devise of leaseholds to testator's daughter for life; remainder to her two sons for life; and in case she should not have a son to attain twenty-one, and of such sons dying without lawful issue, then to her daughters, their executors, administrators and assigns; and if such daughters should die without issue, remainder over: all the residue of his estate the testator devised to his daughter: Held, that the daughter took an estate for life in the leaseholds, with remainder to her two sons for life, with the ultimate remainder, on certain contingencies, to herself. (Fearne's Cont. Rem. 470.)—*Bradshaw v. Skilbeck*, 2 Bing. N. C. 182.
6. (*Of copyholds—Limitation to next male heirs.*) Devise of copyhold lands to testator's widow M. E., for life; remainder to his nephew J. E. and his wife S. E., for their lives; remainder to J. E. their daughter, for life; and after the deaths of all these parties, "to revert to my next male heirs for ever:" Held, that these words meant heirs male of the body; and that as the testator died without issue, the reversion, on the determination of the life estates, descended to the customary heir. (Prec. in Chan. 442; Co. Litt. 24 b; 5 Burr. 1615.)—*Doe d. Eustace v. Easley*, 1 C., M. & R. 823.

And see TRUSTEE.

#### DISTRESS.

Bailiffs employed to distrain for rent arrear, need not be sworn bailiffs under 13 Edw. I. c. 37. (2 Inst. 445; Cro. Eliz. 14.)—*Begbie v. Hayne*, 2 Bing. N. C. 124.

#### EJECTMENT.

(*Defendant's recognizance under 1 Geo. 4, c. 87.*) An application under the 1 Geo. 4, c. 87, s. 1, that the defendant in ejectment should give security, may be made by one of several tenants in common. And it is not necessary that the attesting witness should depose to the execution of the lease, if it be sufficiently proved by other witnesses.—*Doe d. Morgan v. Rotherham*, 3 D. P. C. 690.

## EVIDENCE.

1. (*Decrees in Chancery.*) On the trial of a writ of right, decrees in Chancery between other parties, concerning the same lands, were held admissible in evidence to show the character in which the possessor enjoyed the lands.—*Davies v. Lowndes*, 1 Bing. N. C. 606.
2. What search for attesting witness sufficient to let in proof of his handwriting.—*Miller v. Miller*, 2 Bing. N. C. 76.
3. (*Entry by deceased persons—Declarations in support of rights of party making them—Reputation—Statement in former lease from same lessor—Rejection of evidence.*) An entry by a deceased person, charging himself, is admissible against strangers, even though it appears that the facts stated in such entry were not known to him of his own knowledge.

Ancient answers of conventionary tenants of a manor, stating the rights of the lord, are admissible in evidence even against the freeholders of the manor. But if they state facts only—e. g. that “the commons of the said manor do belong to the tenants of the said manor unstinted, who have always enjoyed the same under the yearly rent of 33s. 4d., as by the records thereof remaining with, &c. appeareth; unto the which, for the more certainty, we refer ourselves:”—in such case they are not admissible. (1 M. & S. 688; 2 B. & Ad. 245; 4 B. & Ad. 273.)

Declarations of a deceased lord of a manor as to the extent of his *rights* over the wastes of the manor, are not admissible in evidence; *aliter*, if spoken of the *extent of the wastes* only.

Reputation is admissible, although not supported by usage.

A lease of tin mines and toll tin was surrendered in 1810, and another lease taken, on payment of a fine, part of which was a compensation for the surrender of the former lease. A statement in a lease of the surface, made by the same lessor during the existence of the former lease, was held admissible in evidence against the lessee in the second lease of the mines and toll.

Where evidence has been improperly rejected, the Court will grant a new trial, unless, with the addition of the rejected evidence, a verdict for the party offering it would be clearly and manifestly against the weight of evidence. (6 Bing. 561; 1 Taunt. 14; 2 B. & A. 559.)—*Crease v. Barrett*, 1 C., M. & R. 919.

And see BANKRUPTCY, 2—BILL OF EXCHANGE, 1—PLEADING, 1, 3.

## EXECUTOR AND ADMINISTRATOR.

1. (*What is evidence of a devastavit.*) In debt on a judgment by default, against defendant as executor, the production of the judgment, and of a *testatum fi. fa.* upon which the sheriff had returned *nulla bona testatoris*, and a levy of costs *de bonis propriis*: Held (being unanswered,) sufficient evidence of a *devastavit*. (1 Salk. 310; 3 T. R. 685; 1 Wms. Saund. 219, b, note.)—*Leonard v. Simpson*, 2 Bing. N. C. 176.
2. (*When executors personally chargeable as lessees.*) A. demised land to B. for one year certain, and then from year to year so long as both parties should please, with power to determine the demise by notice to quit; and the

lease contained various terms and conditions as to the management of the land, and the repair of the buildings. The lessee died, and his executors entered into the occupation of the premises, and continued to occupy, and paid rent, for some years: Held, that they were chargeable in their personal character on the terms contained in the original demise: for that their continuing to occupy, and the landlord's abstaining from giving notice to quit, raised an implied promise on their parts to abide by the terms of the original contract.—*Buckworth v. Simpson*, 1 C., M. & R. 834; 5 Tyrw. 344.

3. (*Pleading judgment recovered.*) In an action against an administrator, the defendant, after obtaining time to plead on the usual terms, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets *ultra*. The Court gave the plaintiff leave to sign judgment as for want of a plea; the defendant having, since the commencement of the action, admitted, by letter, the possession of assets sufficient to cover the judgment and also the plaintiff's demand.—*Roberts v. Wood*, 3 D. P. C. 797.

#### FINE.

- (*Passing of fine after death of conusee.*) Two of the conusors lived in India, the third in England, where his conusance was taken on the 4th April, 1835. The conusee had died on the 29th March, but his death was not known to the third conusor on the 4th April: The Court allowed the fine to pass as to the two conusors in India.—*Griffith's Fine*, 1 Bing. N. C. 720.

#### FOREIGN LAW.

- (*French law of prescription as to promissory notes.*) The French law of prescription with respect to promissory notes appertains *ad tempus et modum actionis instituendæ*, and not *ad valorem contractûs*; and therefore the payee of such notes may sue the maker, if resident in England, during six years from the time they became due. (*Huber de Conflictu Legum*, s. 7; *Code de Commerce*, art. 189; *Code Civile*, arts. 1234, 1350, 1352, 2219; 10 B. & C. 903; *Story's Commentaries*, 487.)—*Huber v. Steiner*, 2 Bing. N. C. 202.

#### FRAUDS, STATUTE OF.

- (*Consideration.*) H. entered into the following written undertaking:—"I enclosed I forward you the bills drawn per J. A. upon, and accepted by, L. D., which I doubt not will meet due honour, but in default thereof I will see the same paid:" Held, that the consideration for A.'s promise did not sufficiently appear to render him liable on this undertaking.—*Hawes v. Armstrong*, 1 Bing. N. C. 761.

#### FREIGHT.

- (*Assignment by owner of unearned freight.*) Assumpsit by the assignees of a bankrupt ship-owner for the freight of a voyage to India, accruing to him before his bankruptcy. Plea, that the bankrupt before his bankruptcy assigned by deed the freight in question to A., in trust to discharge a debt due from him (the bankrupt) to A., and to pay over the surplus, if any, to him: that the defendant had notice of such assignment; that the freight was not



sufficient to discharge the debt, and had been demanded of the defendant by A. Replication, that at the time of the assignment no charter-party or agreement for the freight had been made, and that no freight was then due to the bankrupt in respect of the said voyage: Held, on demurrer, that the defendant was entitled to judgment. (5 M. & S. 228; 13 Ves. 588; 8 Price, 269, n.; 5 M. & S. 79; 4 B. & Ad. 382; Buck, 300.)—*Leslie v. Guthrie*, 1 Bing. N. C. 697.

#### GAOL ACT.

It was held by the Court of K. B. (Parke, J., *dubitante*), and affirmed on error, that under the stat. 4 G. 4, c. 64, the justices of a town and county of a town mentioned in schedule A. to that act, might rate the inhabitants for rebuilding the gaol of such town and county on a new site; although by a local act, which had been carried into effect, it had been enacted that ground should be purchased and conveyed to the corporation of the said town, and that the justices for the town and county should cause a new gaol to be built thereon; that a limited sum should be raised by assessment on the town and county, for the purposes of the act respecting such gaol, the surplus to be repaid proportionally to the parties assessed; and that such gaol, when finished, should be a public gaol for the town and county, and should be *maintained, supported, and repaired* by the corporation.

The 4 G. 4, c. 64, s. 68, enacts, that the justices in sessions may raise money on the counties, towns, &c. to which the act extends, for defraying the expenses of the matters and things thereinbefore directed to be done respecting gaols, &c., in the same manner as rates applicable to the building, repairing, or maintenance of such prisons respectively are now directed to be raised by law:

Held (by the Court of Error), that this applies only to the mode of raising such rates, and not to the persons on whom they are to be laid.

Held (by both Courts), that the power of the justices to rate, as above, under the 4 G. 4, c. 64, is not limited by the 5 G. 4, c. 85, s. 15.

Held (by the Court of K. B.), on the construction of the 4 G. 4, c. 64, ss. 45, 50, that when a presentment has been made as to the propriety of changing the site of a gaol, and the justices in sessions have taken such presentment into consideration, giving the notices required by s. 45, and have resolved that the site ought to be changed, such justices may at their next sessions confirm the resolution, and contract for building the new gaol, without having given fresh notices.—*Thompson v. Raikes*, 1 Ad. & E. 863.

#### GOODS BARGAINED AND SOLD.

In Oct. 1833, the plaintiffs, in London, sold to the defendants a quantity of Sligo butter "at 71s. 6d. per cwt. free on board, first quality; payment, bill at two months from the date of landing; to be shipped this month." The butter was not shipped till November, but the defendants waived the objection, and accepted the invoice and bill of lading. The butter was lost by shipwreck: Held, that the plaintiffs might recover the price as for

goods bargained and sold. (6 B. & C. 388; 8 B. & C. 277; 2 Saund. 269, b, note; 4 B. & C. 219.)—*Alexander v. Gardner*, 1 Bing. N. C. 671.

## HIGHWAY.

(*Indictment for non-repair of—Inhabitants not competent witnesses.*) The rated inhabitants of a district indicted for non-repair of a highway are not rendered competent witnesses for the defence by the 54 G. 3, c. 170, s. 9. (7 B. & C. 815; 1 Moo. & M. 401, 402; 2 B. & Ald. 236.)

An indictment charged that the inhabitants of the townships of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew Auckland, were immemorially liable to repair a highway in the town of Bishop Auckland, in the parish of St. Andrew Auckland; and no consideration was laid: Held bad, in arrest of judgment, for not showing that the highway was within the defendants' district. (5 M. & S. 260; 1 B. & Ald. 348; 2 B. & C. 166.)

Held to be no objection, that the inhabitants of the three townships were charged conjointly.—*The King v. Inhabitants of Bishop Auckland*, 1 Ad. & E. 744.

## HUSBAND AND WIFE.

(*Legality of contract in case of separation.*) The declaration stated, that the defendant agreed with the plaintiff to pay him a certain sum towards the discharge of certain debts due to A. and B. and certain household expenses, and to enlarge the time mentioned in a certain deed of separation for the plaintiff's quitting a house at H., in consideration of the plaintiff's executing the deed of separation, and agreeing to pay such debts and expenses in full; and averred that the plaintiff, confiding in such agreement of the defendant, executed a deed of separation between himself and his wife, and agreed to pay, and took upon himself the payment, of such debts and expenses in full; but that the defendant failed to pay the sum agreed. Plea, that the plaintiff was solely liable to pay the debts and household expenses in full, the agreement to pay part whereof was stated to be the consideration for the defendant's promise: Held, that the plea was bad, and the declaration sufficient.—*Waite v. Jones*, 1 Bing. N. C. 656.

## ILLEGAL CONTRACT.

1. (*Proof of.*) To an action on a promissory note for 100*l.* against the maker, he pleaded that it was made by him in December 1833, in pursuance of an agreement thereby to secure to A. money lost to him at play in July 1833. The proof was, that in July 1833, defendant gave A. a bill of exchange at six months' date for 87*l.* lost at play; that A. indorsed that bill to B.; and that in December 1833, defendant substituted for it the note declared upon, which bore date in September, and was made payable to the order of B. six months after date: Held, that this evidence did not support the plea.—*Boulton v. Coghlan*, 1 Bing. N. C. 644.
2. (*How impeached.*) The plaintiffs sued on an account rendered by the defendants: Held, that the plaintiffs might impeach an item in the account whereby the defendants sought to retain money under an illegal contract;

although that account was the only evidence in the action. (5 Taunt. 245.)—*Rose v. Savory*, 2 Bing. N. C. 145.

#### INFANT.

1. (*Joint and several covenant by infant and another, effect of.*) L., an infant, having granted an annuity, the defendant and L. jointly and *severally* covenanted for the due payment thereof: Held, that the infancy of L. did not avoid and exonerate the defendant from his separate contract. (4 Taunt. 10.)—*Gillow v. Lillie*, 1 Bing. N. C. 695.
2. (*Necessaries.*) The defendant, an infant in low circumstances, hired of the plaintiff a house containing five rooms, at a rent of 15*l.* per annum, in which he carried on his business as a barber. In an action for use and occupation, it was left to the jury to say whether such a house was necessary for a person in the station in life of the defendant. The jury having found for the defendant, the Court refused a new trial. (Com. Dig. Infant, B. 5; Rol. Abr. Enfants, K.; 2 Bulstr. 69; Cro. Jac. 320; 3 Burr. 1717.)—*Lowe v. Griffith*, 1 Scott, 458.

#### INSOLVENT.

1. (*Execution of fi. fa. against, when invalid.*) A sale of an insolvent's goods under a *fi. fa.* issued upon a warrant of attorney given by him, is invalid if it take place after the commencement of the insolvent's imprisonment, although the goods were seized before the imprisonment; and the *execution creditor* is liable to the assignee of the insolvent for the value of the goods.—*Kelcey v. Minter*, 1 Bing. N. C. 721.
2. (*Vesting of copyhold property in assignee.*) The copyhold property of an insolvent debtor vests in his assignee by virtue of the assignment, under 7 Geo. 4, c. 57, s. 11, without entry on the Court rolls.—*Doe d. Smith v. Glenfield*, 1 Bing. N. C. 729.

#### INSURANCE.

- (*On ship—Joint authority from owners to insure, evidence of.*) The managing owner of a ship directed an insurance broker to effect an insurance on the entire ship on an adventure in which all the part-owners were jointly interested: the amount of the entire premium was carried to the ship's account in the books of the managing owner, which were open to the inspection of all the owners; they saw the account and did not object to it. It did not appear that the broker had seen all the part-owners, nor was there any direct evidence that they had authorized the managing owner to insure: Held, that the jury were warranted in inferring a joint authority to insure, and that all the part-owners were jointly liable to the broker for the premium, notwithstanding he had debited the managing owner alone, and divided with him the profits of commission on effecting the insurance. (9 B. & C. 78; 5 Esp. 122; 15 East, 62; 4 Taunt. 574; 3 Price, 538.)—*Robinson v. Gleadow*, 2 Bing. N. C. 156.

#### INTEREST.

1. I. sent goods from Brazil to the defendants, directing them with the proceeds to discharge a debt due from I. to the plaintiff in London. It

had been the course of dealing between I. and the defendants to allow interest on balances remaining in hand and due from either party to the other. The goods were sold, but the defendants refused to remit the proceeds to the plaintiff: Held, that in suing for the amount of such proceeds, the plaintiff could not recover interest on the amount.—*Frühling v. Schroeder*, 2 Bing. N. C. 77.

2. (*On promissory note.*) On a promissory note payable on demand, the plaintiff is entitled to interest only from the day of issuing the writ of summons, unless an agreement to pay interest be shown.—*Pierce v. Fothergill*, 2 Bing. N. C. 167.
3. (*On writ of error.*) The enactment of 3 & 4 W. 4, c. 42, s. 30, that if any person "shall sue out any writ of error," &c. as therein mentioned, and judgment shall be given for the defendant in error, the Court of Error shall allow interest for time as execution has been delayed by such writ, applies only to writs of error sued out since the passing of the act.—*Burn v. Carvalho*, 1 Ad. & E. 895.

#### INTERPLEADER ACT.

1. No rule for interpleading will be granted after a suit has been stayed by injunction.—*Arayne v. Lloyd*, 1 Bing. N. C. 720.
2. (*Costs.*) Where, in consequence of a claim made to goods taken in execution by the sheriff, the Court directed an issue, in which the claimant was to be plaintiff, and was to bring a sum of money into Court, but he did not pay the money or try, and a rule was then obtained to compel him to pay the costs occasioned by his false claim: Held, that he was liable to pay not only those costs, but the costs of the rule also, although no previous application had been made to him.—*Scales v. Sargeson*, 3 D. P. C. 707.

#### LANDLORD AND TENANT.

1. (*Action for double value—Tenants in common.*) Tenants in common cannot sue jointly for double value for holding over, where there has not been a joint demise. (Litt. ss. 316, 317; 2 Blk. 1077; 5 B. & Ald. 850.)—*Wilkinson v. Hall*, 1 Bing. N. C. 713.
2. (*Fraudulent removal of distress.*) A landlord cannot distrain, under 11 Geo. 2, c. 19, s. 1, goods fraudulently and clandestinely removed from the tenant's premises before the rent became due. (3 Esp. 15; 4 Campb. 136.)—*Rand v. Vaughan*, 1 Bing. N. C. 767.

**LIBEL.** See **VENUE**, 2.

**LIMITATIONS, STATUTE OF.** See **FOREIGN LAW**.

#### LONDON COURT OF REQUESTS' ACT.

The defendant is entitled to have a suggestion entered under the London Court of Requests' Act, though the cause was tried before the sheriff by the defendant's consent, and though the motion for that purpose was not made until after the costs had been taxed, final judgment signed, and ex-

ecution issued. And where the defendant was stated to be a silk-broker, having a *warehouse and counting-house* in London, and constantly residing there at the time the cause of action accrued, and until the commencement of the suit: Held, that it sufficiently appeared that he sought his livelihood in London at the time of the commencement of the action, within the meaning of the act.—*Bond v. Bailey*, 3 D. P. C. 808.

### MONEY HAD AND RECEIVED.

(*For fees of office.*) A., a clerk to justices, verbally agreed to permit B. to act in lieu of him, and to allow him half the fees of the office, if C. & D. should say he ought to do so. C. & D. were consulted, and approved of the arrangement. B. accordingly acted as clerk: Held, that he might maintain an action for money had and received, for half the fees received by A.—*Rowland v. Hall*, 1 Scott, 539.

### NUISANCE.

(*Pleadings in action for.*) Plaintiff, possessed of a term of years in a dwelling house, complained of a noisy nuisance created by the defendants near his house. Plea, that the defendants had been possessed of certain workshops, in which the noise was made, ten years before the plaintiff became possessed of the term in his house, and that during that time they had always made the noise in question, which was necessary for carrying on their trade: Held bad.—*Elliotson v. Feetham*, 2 Bing. N. C. 134.

### OUTLAWRY.

1. The debtor's going abroad after an arrest for debt is reasonable cause for the creditor's proceeding to outlawry, although the creditor may know that the debtor has an agent in England.—*Drummond v. Pigou*, 2 Bing. N. C. 114.
2. (*Sequestration of benefice on.*) Upon an outlawry on mesne process, the sheriff, to a *capias utlagatum*, returned that the defendant was a beneficed clergyman, having no lay fee, but that he was rector of a rectory. The Court, on motion, ordered a writ of sequestration to be issued to the bishop. (1 C. & J. 389.)—*Rex v. Armstrong*, 3 D. P. C. 760.

And see PLEADING, 6; PRISONER, 1.

### PARTNERSHIP.

(*What agreement constitutes a partnership.*) The plaintiff agreed with the defendant to convey the mail between N. and B. by horse and cart at £9 a mile *per annum*, and to pay his proportion of the expense of the cart, &c., money received for the carriage of parcels to be divided between the parties, and the damage occasioned by the loss of parcels, &c. to be borne in equal portions: Held, that this agreement constituted a partnership, not a mere measure of wages, and, therefore, that the plaintiff could not sue the defendant for the £9 a mile.—*Green v. Bresley*, 2 Bing. N. C. 108.

And see INSURANCE.

### PATENT.

(*Novelty.*) A patent claimed the invention of manufacturing tubes by

drawing them through rollers, using a *maundril* in the course of the operation. A later patent claimed the invention of manufacturing tubes by drawing them through fixed dies or holes; but the specification was silent as to the use of the maundril. The Court held, that taking the whole of the latter specification together, they would infer that the maundril was not to be used; and sustained the latter patent.—*Russell v. Cowley*, 1 C. M. & R. 864.

#### PAYMENT.

1. (*Judgment without satisfaction does not amount to.*) A purchaser of goods accepted a bill for the price, which the seller indorsed over, and the indorsee recovered judgment on the bill against the purchaser, but did not take out execution; afterwards the seller took up the bill, and received a mortgage from the purchaser, from which however there were no proceeds: Held, that the seller was not, in point of law, paid for the goods.—*Tarleton v. Allhusen*, 2 Ad. & Ellis, 32.
2. (*Evidence of—Plea of payment.*) Payments made to the plaintiff may be given in evidence in reduction of damages, although the defendant has not pleaded payment under the new rules.—*Shirley v. Jacobs*, 2 Bing. N. C. 88.

PAYMENT INTO COURT. See Costs, 1.

#### PLEADING.

1. (*Evidence under non assumpsit.*) A defence on the ground of want of consideration for an agreement, cannot be proved under the plea of *non assumpsit*.—*Passenger v. Brookes*, 2 Bing. N. C. 587.
2. (*In case—Surplusage.*) The plaintiff declared that he was in possession of a close and pond; that the defendant was possessed of a close used as a private road adjoining plaintiff's close and pond; and that defendant wrongfully made in his said close, used, &c. a sewer near to plaintiff's pond, and continued it for a long time, and thereby during all that time diverted the water of the pond: Held, that the allegation that defendant's close was used as a private road at the time of making the sewer was surplusage, and the plaintiff was not bound to establish it in proof: Held also, that under the plea of not guilty, the defendant could not take any objection to matters of inducement.—*Dukes v. Gostling*, 1 Bing. N. C. 588.
3. Assumpsit for work and labour. Plea, that the work was to be completed to the satisfaction of defendant or his surveyor; and that it never had been completed to the satisfaction of the defendant or his surveyor. Replication, that it was completed to the satisfaction of defendant and his surveyor; without this, that it was not completed to the satisfaction of defendant or his surveyor. Issue thereon: Held, that it was sufficient to show that the work was done to the satisfaction of the defendant. (4 M. & S. 349; 3 B. & C. 113.) But *semble*, that the replication was demurrable. (1 Bing. N. C. 323; 2 Saund. 206.)—*Bradley v. Milnes*, 1 Bing. N. C. 644.

4. (*In trover for bill of exchange.*) To trover for a bill of exchange, defendant pleaded, that the drawer, being lawfully possessed of the bill, indorsed it to A., and that A. for good consideration indorsed it to defendant. Replication, that there was no good consideration for A.'s indorsement. The jury having found for the plaintiff, the Court refused to arrest the judgment or award a repleader. (Cro. Eliz. 485.)—*Fancourt v. Bull*, 1 Bing. N. C. 681.
5. (*In debt for rent against assignee.*) In debt for rent against an assignee, the defendant traversed an averment in the declaration, that *all* the estate in the premises came to and vested in him by assignment. Issue having been joined thereon, and the defendant having proved that he was assignee of *part* of the premises only: Held, that the verdict on such issue must be entered for the defendant. (Cowp. 766.)—*Curtis v. Spitty*, 1 Bing. N. C. 756.
6. (*In action for malicious outlawry—General issue.*) In an action for maliciously suing the plaintiff to outlawry, the general issue, not guilty, puts in issue only the existence of reasonable and probable cause, and not the reversal of the outlawry.—*Drummond v. Pigou*, 2 Bing. N. C. 114.
7. (*General issue in assumpsit.*) Under *non-assumpsit* to goods bargained and sold, the defendant may show that the contract was made subject to certain conditions, which have not been complied with by the seller.—*Alexander v. Gardner*, 1 Scott, 281.
8. (*Repleader.*) In an action on a bill of exchange, the defendant having pleaded a plea of want of consideration, concluding with a verification, the plaintiff, instead of replying by taking issue on the plea, merely added a *similiter*. After verdict for the plaintiff, the Court held that the record was imperfect, and that there ought to be a repleader; but to save expense, the plaintiff was allowed to amend on payment of costs.—*Wordsworth v. Brown*, 3 D. P. C. 698.
9. (*Similiter, want of, how supplied.*) To an action on a bill of exchange against an indorser, the defendant pleaded that he had no notice of presentment, concluding to the country. The plaintiff omitted to add the *similiter*; and after verdict for the plaintiff, a motion was made for a new trial, on the ground that there was no issue joined; but it appearing that the plea concluded with an "&c.," the Court thought that might, after verdict, be considered to include the *similiter*, and that the record was sufficient.—*Swain v. Lewis*, 3 D. P. C. 700.
10. (*Accord and satisfaction—Plea of substituted bill of exchange—Replication de injuriâ in assumpsit.*) To a declaration on a promissory note by payee against maker, the defendant pleaded, that after the accruing of the cause of action, the plaintiff drew on the defendant a bill of exchange for a larger amount, for and on account of the said note, which the defendant accepted, and delivered to the plaintiff, *who took it* on account of the said note: Held bad, as not showing that it was accepted or delivered by the defendant on account of the note; or that it was given or received *in satisfaction*. (1 Bing. N. C. 502.)

The plaintiff replied, that the defendant neglected to pay the note of *his own wrong, and without the cause alleged in the plea*. Special demurrer, alleging for cause that the replication was multifarious, and too general, and not proper in an action on promises. *Semble*, that this replication (if properly pleadable in such an action) was bad in this instance, as being inapplicable to the plea, and therefore not putting the matters of the plea in issue: for the plea did not show any *cause* for the breach of the promise alleged in the declaration, but merely set forth matter which had occurred subsequently, showing that the plaintiff's right of action was suspended or transferred. (8 Co. 132; 5 T. R. 513.)—*Crisp v. Griffiths*, 3 D. P. C. 753.

11. (*Double counts*.) In an action for tithes, the plaintiff introduced two counts into the declaration, one for the treble value of tithes not set out, the other for the same tithes bargained and sold: Held, that this was a violation of the rule of H. 3 & 4 W. 4, s. 5, and the Court ordered the latter count to be struck out, with costs; but bound the defendant to agree not to set up a composition at the trial, or that, if he did, the declaration might be amended.—*Lawrence v. Stephens*, 3 D. P. C. 777.
12. (*Plea of payment*.) In an action for use and occupation, since the new rules, where there was no plea of payment: Held, that it could not be left to the jury to say whether the evidence produced by the defendant did not amount to an admission by the plaintiff that he had been paid, and that nothing was due: and that such evidence was not admissible under a plea of set-off for money due on an account stated between the parties.—*Linley v. Polden*, 3 D. P. C. 780.
13. Where there are two pleas to the whole action, upon one of which issue is joined to the country, and on the other judgment is given for the defendant on demurrer, the Court will allow the defendant to strike out the general issue.—*Young v. Beck*, 3 D. P. C. 804.

And see COSTS, 4, 6, 10; NUISANCE; PAYMENT, 2; PRACTICE, 10, 22, 24.

#### PRACTICE.

1. (*Staying proceedings*.) An application to stay proceedings on payment of debt and costs, *must* be made within four days after service of process.—*Bowdidge v. Slaney*, 2 Bing. N. C. 142.
2. (*Entering judgment nunc pro tunc*.) Since the statute 1 & 2 W. 4, c. 58, s. 7, the Courts have no power to give effect to a judgment previously to the true time when it is entered.—*Lambirth v. Barrington*, 2 Bing. N. C. 149.
3. (*Judgment as in case of nonsuit*.) The defendant caused the plaintiff to be taken before a magistrate for an alleged assault. The charge being dismissed, the plaintiff brought an action on the case for the arrest and false imprisonment. The defendant having preferred an indictment at the sessions, which was afterwards removed by certiorari into the K. B., the plaintiff withdrew the record in this cause, in order to await the decision of the Court on the indictment. A rule for judgment as in case of a nonsuit was discharged with costs.—*Long v. Hutchins*, 1 Scott, 400.



25. (*Term's notice of proceedings.*) A term's notice of proceeding is not necessary after the lapse of four terms, if the delay has taken place at the defendant's request.—*Evans v. Davies*, 3 D. P. C. 786.
26. (*Amendment, at what time allowed.*) In an action for slander, the general issue only being pleaded, there was a verdict for the plaintiff with 100*l.* damages. The Court refused to allow the defendant to have a new trial, and to be let in to plead the truth of the words, on any terms, although it was alleged that there was ample evidence to support a justification, and that the general issue was pleaded alone through the pleader's mistake, which was not discovered till the day before the trial by the counsel, when an application was made for leave to add a justification: but the defendant did not swear he had never used the words, and it appeared that one of the witnesses had pointed out the want of a special plea a considerable time before.—*Kirby v. Simpson*, 3 D. P. C. 791.
27. (*Sci. fu. on Welsh judgment.*) On a plea of *nul tiel record* to a declaration in the Exchequer, on a judgment obtained in a Welsh Court of Great Sessions, before the passing of the 11 G. 4 and 1 W. 4, c. 70, the plaintiff is entitled to the judgment of the Court on producing the certificate and affidavit of the record being in the hands of the officer, pursuant to the rules of M. 1 W. 4, though the actual judgment is not in Court.—*Howell v. Brown*, 3 D. P. C. 805.
28. (*Admission of documents.*) The commission day of the assizes was on the 4th March; notice of trial had been given on the 21st February, and a notice to admit certain public documents was served on Saturday, February 28th, on the London agent of the defendant. He refused to admit copies; on the Monday another application was made, and the copies were produced to him, but he again refused, and a summons was then taken out, returnable the next day, but not attended. On the previous evening the agent sent off the briefs. The Court fixed the defendant with the costs of proving the documents.—*Tynn v. Billingsley*, 3 D. P. C. 810.

#### PREScription.

- (*Presumption of immemorial right—Port duty.*) The corporation of Truro, in 1795, made a lease of the office of meter, with all fees, emoluments, &c., arising from the measuring of coal, &c., imported. It was proved that they had been accustomed for nearly sixty years to receive these payments upon all coal imported into the port. The judge told the jury that he was not aware of any rule of law to prevent them from presuming the immemorial existence of the right from the modern usage; but he did not expressly advise them to make such presumption, unless some evidence to the contrary appeared; nor did he explain to them the nature of a port duty, and state that as such the claim might be referred to a modern grant. The Court (the verdict being against the corporation) granted a new trial.—*Jenkins v. Harvey*, 1 C., M. & R. 877; 5 Tyrw. 326.

PRINCIPAL AND AGENT. See INSURANCE.

**PRISONER.**

1. (*Time to declare against—Outlawry.*) Where one of two defendants is in custody, and the plaintiff is proceeding to outlawry against the other, he must apply to the Court or a judge for time to declare against the prisoner until the outlawry of the other defendant is perfected. (*Tidd*, 424.)—*De Lannoy v. Benton*, 1 Scott, 386.
2. (*Discharge of small debtor.*)—An application under the 48 G. 3, c. 123, must be made to the Court out of which the process issued. That act does not apply to attachments.—*Pitt v. Evans*, 3 D. P. C. 649.

**PROCESS.**

1. (*Alteration of writ of summons.*) After the delivery of a writ of summons in a real action to the sheriff, but before he had done anything upon it, the demandant's attorney, finding that it was made returnable on a *dies non*, altered the return day, and procured the writ to be resealed, giving the tenant notice of the newly inserted return day. The Court refused to set aside the writ for irregularity. (1 Marsh. 602.)—*Miller v. Miller*, 2 Bing. N. C. 66.
2. (*Amendment of capias.*) A *capias* cannot be amended by the substitution of one form of action for another.—*Mills v. Gossett*, 1 Scott, 313.
3. (*Indorsement on writ.*) The Court refused to set aside the copy of a writ because the plaintiff was described in the indorsement as "the plaintiff," instead of by name.—*Hannah v. Wyman*, 3 D. P. C. 673.
4. (*Arrest in wrong name.*) A defendant whose name was *Cocken*, was arrested on a *capias* against him by the name of *Cocker*: he gave a bail-bond to the sheriff by the name of *Cocken* sued as *Cocker*; and the bail-bond being assigned to the plaintiff, he declared thereon against the defendant as *Cocken* sued by the name of *Cocker*. The defendant pleaded that no such writ as that stated in the declaration was issued against him. It was admitted that he was the real defendant. The plaintiff was nonsuited; but the Court set aside the nonsuit, and ordered a verdict to be entered for the plaintiff, because in point of fact there was a writ against the defendant by the name of *Cocker* (overruling *Scandover v. Warne*, 2 Campb. 269). But it was also held, that the arrest and bail-bond were both illegal, and that neither the 3 & 4 W. 4, c. 42, s. 11, nor the rule of H. 2 W. 4, c. 32, had made any alteration in the law in this respect; and the judgment was arrested. (6 T. R. 224; 8 East, 238; 2 Chit. R. 357.)—*Finch v. Cocken*, 3 D. P. C. 678.

**PROMISSORY NOTE.**

1. A note by which the maker promises to pay A. a sum of money on demand, with lawful interest until payment, for value received, is not a note payable to *bearer* on demand, but is a note payable otherwise than to bearer within two months after date. (8 B. & C. 7; 5 B. & Ad. 837.)—*Dixon v. Chambers*, 1 C., M. & R. 845.
2. (*Pleading and proof of consideration.*) Action by the indorsee against the indorser of a promissory note for £500. Plea, as to £300, that the

note was indorsed by the defendant for the accommodation of the maker, and as a security to the plaintiffs, who were his bankers, for subsequent advances; and that only £200 was subsequently advanced, and therefore, as to £300, that there was no consideration. Replication, that the plaintiffs were holders for good and valuable consideration given by them to the maker to the amount of £500: and issue thereon. Held, that on this issue the plaintiffs were not bound to give any evidence of consideration, unless their title was impeached by evidence given by the defendant; and that they were entitled to recover the whole amount of the note.—*Percival v. Frumplin*, 3 D. P. C. 748. [See *ante*, p. 141.]

And see FOREIGN LAW; INTEREST, 2; PLEADING, 10.

SET-OFF. See BANKRUPTCY, 3, 4.

SHERIFF.

(Attachment against—Service of rule to return writ.) A *fi. fa.* was put into the sheriff's hands on the 14th December, 1833, returnable on the 30th. The sheriff went out of office on the 14th of February following. A rule to return the writ was taken out in June, 1834, which was served in the same month on the under-sheriff of the new sheriff; but it was not served on the under-sheriff of the old sheriff till November. An attachment afterwards obtained against the old sheriff, for not returning the writ, was set aside as irregular.—*Yaroth v. Hopkins*, 3 D. P. C. 711.

SLANDER. See COSTS, 9; PRACTICE, 26.

STAMP.

1. (*Double Stamps.*) A feoffment, for the consideration of natural love and affection, and 10s., does not require two 3s. stamps, under 55 G. 3, c. 184, Sched. pt. 1, titles *Feoffment* and *Conveyance*.—*Doe d. Wheeler v. Wheeler*, 2 Ad. & E. 28.
2. (*Agreement for sale of goods, what is.*) An agreement for the sale of a half share in a horse, in which there was also a stipulation that the horse should be entered for a racing stake, held to be an agreement for the sale of goods, within the exceptions to the Stamp Act. (5 Esp. 269; 1 Stark. N. P. C. 437; 2 Man. & R. 121; 13 East, 7.)—*Marson v. Short*, 2 Bing. N. C. 118.
3. (*Lease stamp, what sufficient.*) An instrument, which was in reality a lease, but which bore an agreement stamp for 15s., was executed in 1805, at which time the amount of a stamp on a lease, according to the act then in force, was 1l. 10s.; but in 1834 it was stamped, under the provisions of the 37 G. 3, c. 136, s. 2, with a stamp of £1, being the amount of the stamp then in force: Held, that the proper duty had been paid.—*Backworth v. Simpson*, 1 C., M. & R. 834; 5 Tyrw. 344.

STOPPAGE IN TRANSITU. See VENDOR AND PURCHASER, 2.

TENANTS IN COMMON. See LANDLORD AND TENANT, 1.

TITHES.

1. Mere non-payment of tithes is no answer to a claim of tithes by a lay

impropriator. (In the House of Lords.)—*Andrews v. Drever*, 2 Bing. N. C. 1.

2. (*Presumption of immemorial payment in lieu of.*) On a bill filed to enforce the payment of certain specified sums in lieu of tithes, it was proved that the occupier of certain houses, either ancient or built on ancient sites, and situated in that part of the parish of St. Andrew, Holborn, which is without the city of London, had for the last century uniformly paid the rector certain specified and invariable sums in respect of each house; but such payments were never made by the owners or occupiers of houses built on new sites. The payments varied in amount on different houses, and were not in any distinct rate or proportion to the relative value of the houses, and were not general through this part of the parish: Held, that the Court were warranted in inferring, from these facts, that the payments had been made from time immemorial; secondly, that they could assign a legal origin for such payments, and that they could be legally enforced by the rector.—*Beresford v. Newton*, 1 C., M. & R. 901.

And see PLEADING, 11.

#### TRESPASS.

1. (*Pleadings—Naming close.*) Declaration for seizing pigs; plea, that defendant was possessed of a close named H., in which the pigs were eating, &c. and were taken damage feasant; replication, that the defendant was not possessed of the said close in the said plea mentioned, in which the pigs were alleged to be eating, &c.: and issue thereon. There were several adjacent closes called H.: Held, that the defendant was bound to show that he was possessed of a close in which the pigs were eating, &c., and that it was not enough for him to show his possession of a close named H.—*Bond v. Downton*, 2 Ad. & E. 26.
2. (*Pleadings—Denial of possession.*) Trespass *qu. cl. fr.* Pleas, 1st, not guilty; 2d, that the close was not *the close* of the plaintiff; 3d, that it was the soil and freehold of the defendant: Held, that evidence of *possession* was sufficient to entitle the plaintiff to a verdict on the second plea.—*Heath v. Milford*, 2 Bing. N. C. 98.
3. A., the owner of freehold houses and land, with a yard adjoining thereto, demised by parol several of the houses. The tenants were in the habit of passing over the yard, and using a common pump there. There was no evidence whether the yard formed part of the demise or not. In trespass by one of the tenants against the landlord for excluding him from the yard, the judge left it to the jury to say whether the landlord, at the time of the demise, had reserved the yard: Held a misdirection; the question being, not whether he had *reserved* it, but whether he had *demised* it.—*Hebbert v. Thomas*, 1 C., M. & R. 861.

#### TRUSTEE.

- (*Vesting of legal estate in.*) Devise to two trustees in trust to permit testator's wife and daughters to receive the *clear* rents of three parts of the land to their sole and separate use, and the testator's son the *clear* rent of the fourth part: the trustees to pay all outgoings, to repair, and to let

the devised estates: Held, that the legal estate, as to the whole, vested in the trustees. (7 T. R. 653; Cowp. 766; 2 Wms. Saund. 11, n.)

On the death of either of the trustees, the survivor was to appoint another in his stead, and to convey the premises to such new trustees, to hold them jointly with the survivor. One of the trustees died: the survivor, by a deed to which the *cestui que trust* were parties, appointed A. sole trustee, in place of himself and the deceased, and conveyed the premises to A. to hold (solely) to him and his heirs: Held, that the whole legal estate passed to A. (2 Vin. Abr. 262; 4 Man. & R. 101.)—*White v. Parker*, 1 Bing. N. C. 573.

#### TURNPIKE ACTS.

(*Payment of second toll.*) A local turnpike act imposed tolls for every horse drawing any coach, and other tolls on every horse not drawing; it provided, generally, that if the tolls had in any one day been paid for in the passing of any horse, such horse should on that day repass such toll free; but enacted that the tolls for horses drawing any stage coach should be payable every time of passing. The trustees let the tolls, with power to collect them according to the act, and subject to such rules and restrictions as should be imposed by the trustees: and the lessee covenanted with the trustees to permit the owners of stage coaches, waggons, &c. to pass in the following manner, viz. *horses drawing any such carriage* as thereinbefore mentioned, to be respectively allowed to pass on payment of full toll going, and quarter toll returning, at any time during the same day. Horses passed through a gate, drawing a stage coach, and full toll was paid for them: they returned the same day, drawing another stage coach; Held, that the lessee ought, by his covenant, to demand quarter toll only on such return. (1 Bing. N. C. 81; 10 East, 66; 2 B. & B. 30; 3 Bing. 41.)—*Fenton v. Swallow*, 1 Ad. & E. 723.

#### VENDOR AND PURCHASER.

1. (*Determination of transitus of goods—Lien.*) C. purchased goods of the plaintiff in London, and directed them to be forwarded to Guernsey, by the care of the defendant, who was C.'s shipping agent at Southampton. The defendant took the goods from the warehouse of a London and Southampton waggoner, by whom they had been brought from London, paid the waggoner's charges, and shipped the goods for Guernsey in his own name. C., who was insolvent, wrote at the plaintiff's request to the defendant to reland the goods, without saying why; the defendant's clerk, in his master's absence, obtained a custom-house order for that purpose; but before the goods were relanded, the seller of other goods to C., shipped in the same vessel, although a stranger to the plaintiff, and unauthorized by him, ordered the defendant's clerk to stop the goods sold by the plaintiff to C.; whereupon the clerk promised that the defendant should hold them for the owner. Held, that there was no such determination of the transitus to Guernsey, as to authorize the defendant to hold the goods in assertion of a lien for a general balance due to him from C.—*Nicholls v. Le Feuvre*, 2 Bing. N. C. 81.

2. (*When sale of goods complete.*) A. sold to B. trees lying upon C.'s land at a certain price per cubic foot, and B. was to have the power of removing them when he pleased. The trees having been marked by the purchaser, the cubical contents of each ascertained, and some of them having been taken away: Held, that the transfer of the whole was complete, and that upon B.'s bankruptcy, A. could not enforce any lien on the trees as an unpaid vendor, although they remained on C.'s land, and the sum total of the cubical contents had not been ascertained. (6 East, 614; 5 B. & C. 857.)—*Tansley v. Turner*, 2 Bing. N. C. 151.

## VENUE.

1. (*Whether transitory or local.*) An action of *assumpsit* for the breach of an implied contract to keep premises in repair, is transitory, and not local.—*Buckworth v. Simpson*, 1 C., M. & R. 834; 4 Tyrw. 344.
2. In an action for a libel published in a Liverpool newspaper, the venue having been changed from Middlesex on the defendant's affidavit that the cause of action arose in the county of Lancaster and not elsewhere, and on special grounds as to residence of witnesses, the Court refused to bring back the venue, on an affidavit that the plaintiff had eight witnesses in London, and that notice of trial had been given, and briefs prepared; it appearing that several witnesses for the defendant lived at Liverpool, and the defendant agreeing to withdraw the general issue and rely on his plea of justification, and to furnish the plaintiff with a copy of the newspaper.—*Greenslade v. Ross*, 3 D. P. C. 697.
3. (*In action by attorney.*) If the plaintiff, being an attorney, does not sue as such, but appears by another attorney, the defendant may change the venue as a matter of course, on the usual affidavit.—*Loveless v. Timms*, 3 D. P. C. 707.

WELCH JUDICATURE. See PRACTICE, 27.

## WITNESS.

1. (*Competency.*) A. being employed by B. to procure a bill of exchange to be discounted, instead of doing so lodged it with C. as a security for a debt due from him to C. In trover for the bill by B. against C.: Held, that A. was a competent witness for the plaintiff.—*Fancourt v. Bull*, 1 Bing. N. C. 681.
2. (*Mandamus for examination of, abroad.*) A *mandamus* cannot be issued into Scotland for the examination of witnesses there, under the 1 W. 4, c. 22, s. 1; but a *commission* may be issued under s. 4.—*Wainwright v. Bland*, 3 D. P. C. 654.
3. (*Commission for examination of witnesses.*) A commission to examine witnesses may be granted for the trial of an issue directed by the Court of Chancery, by the Court to which the issue is directed.—*Bourdeaux v. Rowe*, 1 Bing. N. C. 721.

And see HIGHWAY.

**WRIT OF ERROR.**

After verdict for the plaintiff in an action for slander, the defendant obtained a rule *nisi* for arresting the judgment on two grounds, which was afterwards discharged without hearing the counsel against it. The defendant then brought a writ of error suggesting the same grounds: Held, that those grounds could not be considered as frivolous within the meaning of rule 9 H. T. 4 W. 4.—*Gardner v. Williams*, 3 D. P. C. 796.

**WRIT OF RIGHT.**

(*Amendment in.*) The Court allowed the tenant in a writ of right to withdraw a demurrer and plead *de novo*.—*Twining v. Lowndes*, 2 Bing. N. C. 133.

**WRIT OF TRIAL ACT.** See PRACTICE, 8, 14, 15.

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## EQUITY.

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[Containing 7 Bligh, Part 2; 1 Younge & Collyer, Part 2; and 2 Mylne & Keen, Part 3.]

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## ARREST.

1. A barrister who had attended the Court upon a motion for a receiver in a cause in which he was a defendant, was arrested on quitting the Court, by a sheriff's officer, who refused to bring him into Court, but took him to a lock-up-house. On being brought up by habeas corpus, he was discharged, and the sheriff ordered to pay the costs of the proceeding. (Orchard's case, 5 Russ. 139.)—*Anonymous*, Y. & C. 331.
2. (*Election*.) S. having issued a fiat in bankruptcy against H., and having in the course of his examination discovered that he was merely the agent of T., proceeded nevertheless to sign the certificate of H.: Held, that this was not an election by S. to treat H. as his sole creditor. (Bateman v. Willoe, 1 S. & L. 201.)—*Taylor v. Sheppard*, Y. & C. 271.
3. (*Pleading*.) To a bill against the assignees of a bankrupt for an account, one of them demurred for want of equity, and the demurrer was allowed: Held, that another assignee might plead this matter in bar of the suit. (Turner v. Robinson, 1 S. & St. 3.)—*Tarleton v. Hornby*, Y. & C. 333.
4. (*Trust*.) M. upon his marriage, executed to trustees a bond, and also a mortgage for securing to them 15,000*l.*, to be in trust for M. for life, and then for his wife and children. M. afterwards assigned his life interest in this money to S. as a security for a debt due to him. M. having become bankrupt, S. filed his bill against the assignees to obtain the benefit of his security, and obtained a decree directing M.'s life interest to be sold, and the produce paid to S. The assignees afterwards sold the mortgaged estates, which realised less than 15,000*l.*: Held, that no proceedings in the bankruptcy could affect the specific security of the trustees, and that they had a right, as against the assignees, to hold the fund until they were paid what was due to them. (Priddy v. Rose, 3 Mer. 86.)—*Smith v. Smith*, Y. & C. 338.

## BILL OF EXCHANGE.

1. (*Forgery*.) A Court of Equity will restrain a bonâ fide indorsee of a bill of exchange, negotiated by means of a forged indorsement of the name of the payee, from proceeding against the acceptor, and will direct the bill to be delivered up to be cancelled; the title of the indorsee under the forged indorsement being in fact a mere nullity.—*Esdaile v. La Nauze*, Y. & C. 394.



2. (*Indorsement.*) Where the original indorsement of a bill of exchange is a forgery, the indorsement, after the bill has reached maturity by the payee, will not confer a title on the holder; the bill being then subject to all the equities of the acceptors.—S. C.

#### CHARITY.

1. (*Cy pres.*) A testator gave the residue of his estate to the uses after stated in his will, and to no other use, and then directed one moiety of the proceeds to be applied to a charitable purpose, which failed. Held, that the Court had authority to apply the moiety *cy pres.* (*Attorney-General v. Bishop of Llandaff*, March 19, 1829.)—*Attorney-General v. Ironmongers' Company*, M. & K. 576.
2. Where the surplus rents of an estate, charged with payments for the benefit of a charity, are devised to the testator's executors and their heirs to and for their sole and perpetual use for ever, the charity can claim no more, though by the change in the value of money the intentions of the testator are in a great measure defeated.—*Attorney-General v. Gascoigne*, M. & K. 647.
3. (*Grammar School.*) The Court will sanction the introduction of a provision for teaching writing and arithmetic, into the scheme for the management of a free grammar school. (*Attorney-General v. Haberdashers' Company*, 3 Russ. 530.)—S. C.
4. (*Scheme.*) Where money had been bequeathed by various wills to a company for the purpose of being lent, without interest, to young freemen of the company, in sums not exceeding 200*l.*, and the master, in settling a scheme, directed the maximum of the sums so lent out to be 500*l.*; it was held, that having regard to the fact that the latest of the wills was 200 years old, and to the alteration in the value of money, the increase in the amount of the loans was not inconsistent with the intention of the testator.—*Attorney-General v. Mercers' Company*, M. & K. 654.
5. (*Costs.*) The costs of an information must be paid by a company in whom a charitable fund is vested, if the charity be suffered to fall into desuetude by their neglect.—S. C.
6. The attendance of the Attorney-General at an inquiry before the Master, upon reference to settle a scheme for the administration of a charity, will be dispensed with in particular cases.—*Attorney-General v. Haberdashers' Company*, M. & K. 817.

#### CONSIGNMENT.

The agent of a mercantile house in London, having been appointed executor of A., a merchant, at Sierra Leone, consigned to the house portions of A.'s property, with directions that the proceeds should be placed to the credit of the agent as executor of A., and not to his general account with the house. This was done accordingly. Held, that this was a particular consignment, and that the proceeds were trust money in the hands of the merchants in London, and that as such they were bound to pay it into

Court on a bill for an account by the representative of A.—*Leigh v. Ma-caulay*, Y. & C. 260.

### COPYHOLDS.

This Court will not reform an entry on the Court Rolls of a manor, unless the lord be a party to the suit, or consent to such order as the Court shall think fit to direct; but on such consent, the Court decreed that a sur-render and admission made in fraud of a mortgagee, should be reformed. —*Elston v. Wood*, M. & K. 678.

### COPYRIGHT.

1. A publication of the airs of an opera in which there is a copyright, in the shape of quadrilles and waltzes, with some alterations and additions, is an act of piracy.—*D'Almaine v. Boosey*, Y. & C. 288.
2. The assignee in England of the copyright of a foreign musical composition is within the protection of the statutes relating to copyright. [*Bach v. Longman*, Cowp. 623.]—S. C.

### COSTS.

1. (*Act of parliament.*) Where an act of parliament establishing a railway company, directed that the money to be paid for lands purchased by the company should be paid into the Bank, until the same should, upon petition, be applied in the purchase of other lands; and in the meantime, and until such purchase could be made, should, upon application to the Court, be invested in the three per cents.; and that the expenses and costs attending such purchase should be paid by the company: Held, that the costs of an application to have the money invested, must be borne by the petitioner.—*Exp. Taylor*, Y. & C. 229.
2. (*Parties.*) Where an equitable lessee of tithes having a right to call upon the rector for a conveyance of the legal interest, neglected to do so, and on the rector's refusal to join as a plaintiff in a suit for the recovery of the tithes, made him a defendant: Held, that the rector was entitled to his costs.—*White v. Gardner*, Y. & C. 385.
3. (*Creditors.*) Costs as between solicitor and client were given out of the funds to simple contract creditors, filing a bill for the administration of a testator's estate, although the assets proved insufficient to satisfy the specialty creditors. (*Larkin v. Paxton*, 1 M. & K. 320.)—*Barker v. Wardle*, M. & K. 818.

### COVENANT.

A canal act provided, that upon auxiliary railroads, made by individuals under the authority of the act, the tolls should not exceed those of the canal company, which on limestone was twopence halfpenny a ton; and it empowered the company itself, by agreement with the landowners, to construct auxiliary roads, on which a toll of fivepence a ton might be charged. The lessees of several iron-works, and among others of the B. works, having formed a joint stock company with other persons, constructed a railroad connecting a lime quarry with the iron-works and the company's roads. In the partnership deed of this railroad company, the lessees of the B.

works covenanted for themselves, their heirs, executors, administrators, and assigns, with the other shareholders, their executors, administrators, and assigns, so long as the covenantors, their executors, administrators, or assigns, should occupy the works of B., to procure all the limestone used in those works from the quarry, and to convey it by the railroad, and to pay a toll of fivepence a ton. On a bill by the shareholders of the railroad to enforce this covenant against a purchaser of the B. works, with notice of the partnership deed: Held, that the covenant did not run with the land [*Uxbridge v. Staveland*, 1 Ves. sen. 56; *Vybian v. Arthur*, 1 B. & C. 410]; and that the Court would not, on account of the notice, give the covenant a more extensive operation than the law allowed; and that the covenant securing fivepence a ton to the shareholders of the railroad was a fraud on the canal company.—*Keppell v. Bailey*, M. & K. 517.

2. On a conveyance of land in fee by deed of feoffment, subject to a perpetual ground rent, the feoffee covenanted for himself, his heirs and assigns, with the feoffor, his heirs, executors, administrators, and assigns, not to use the land in a particular manner. The feoffor, who was the owner of land adjoining, afterwards so altered the character of such adjoining lands, that the covenant ceased to be applicable according to the intent and spirit of the contract. The Court refused to interfere to enforce the covenant—leaving the parties to their remedy (if any) at law.—*Duke of Bedford v. The Trustees of the British Museum*, M. & K. 552.

#### ELECTION.

A party claiming under an instrument raising, as he insists, a case of election in equity, against one in possession, under a legal right, must make out a distinct and satisfactory case, in order to displace the legal title. Where, therefore, under the will of a son, giving benefits to his father, there was no evidence that the father understood that a case of election arose under the will, or, if so, that he had elected to take under it, and to give up estates disposed of by the will, to which he was entitled under his marriage settlement; and where there was evidence that the father acted in opposition to the son's will, and by his own will so disposed of the estates that his daughters might either claim life estates under it, or estates in fee simple under that of the son; and they had elected to take as tenants for life under the will of the father: and where the equity, if any, arose upwards of forty years before the suit, and the daughters had then an opportunity of calling on the father to elect and had failed to do so: Held, that it was doubtful whether a case of election had existed, and that a party claiming under the daughter as heir, could not assert such right in equity, after such a lapse of time. (*Cholmondley v. Clinton*, 4 Bl. 1.)—*Dillon v. Purker*, Bli. 326.

#### EVIDENCE.

1. (*Insolvent*.) Certified copies of the schedule, assignment, &c. may be given in evidence under the Insolvent Act, by parties other than the insolvent or his creditors.—*Price v. Assheton*, Y. & C. 441.

2. (*Husband and wife.*) Admissions in a joint answer of husband and wife are not evidence against the wife, the answer being considered as that of the husband alone.—*Elston v. Wood*, M. & K. 677.

### ILLEGITIMATE CHILD.

Where an estate was limited to an afterborn illegitimate son in fee, and if he should die under 21, then in fee to a living illegitimate child, who died under 21: and an afterborn illegitimate son attained 21, it was held, that the last limitation could never take effect (*Blodwell v. Edwards*, Cro. Eliz. 509); and that the fee resulted to the heir of the grantor. (*Robinson v. Hardcastle*, 2 Bro. C. C. 22. 344.)—*Lomas v. Wright*, M. & K. 775.

### INCLOSURE ACT.

The provision in the General Inclosure Act, that the commissioners' oath, and the appointment of any new commissioner, shall be annexed to, and enrolled with the award, is merely directory.—*Casamajor v. Strobe*, M. & K. 706.

### LAND TAX.

H. was, under a settlement, entitled for life to real estates, with remainder to his first and other sons in tail, with remainder to I. for life, with remainder to his first and other sons in tail, with other remainders which failed in the lifetime of H., and an ultimate remainder which became vested in H. I., during the life of H., redeemed the land-tax on the settled estates, and took an assignment to himself under the Land Tax Act. H. died without issue, having devised his ultimate remainder in fee to I., who afterwards died without issue, having devised the fee of the estates: Held, that I.'s taking an assignment to himself, amounted to a declaration that the land-tax redeemed should be part of his personal estate; and that in the absence of any thing subsequent to show a contrary intention, it continued to be so.—*Trevor v. Trevor*, M. & K. 675.

### MAINTENANCE.

1. An agreement that the plaintiff, a rector, would demise the tithes of the rectory to the defendant, with a stipulation that the latter would covenant to commence and prosecute, if so advised by counsel, all proper legal proceedings for recovering the tithes of certain lands which had not hitherto paid tithes, is not within the Statute of Maintenance.—*White v. Gardner*, Y. & C. 385.
2. It is not maintenance to purchase an interest which is the subject of a suit; otherwise, if the purchaser give an indemnity against all costs incurred or to be incurred by the seller in the prosecution of the suit. So where, after a decree in a creditor's suit, the plaintiff sold a debt which he had proved in the cause, and took from the purchaser an indemnity against all expenses which he had incurred and might incur in the suit, and his name continued to be used as plaintiff in the suit, together with that of the

purchaser: Held, that this amounted to maintenance, and the bill was dismissed.—*Harrington v. Long*, M. & K. 590.

#### MARSHALLING OF ASSETS.

Specialty creditors, being mere volunteers, are not entitled to compete with simple contract creditors for valuable consideration; but as against devisees, they are entitled to stand in the place of mortgagees who have been satisfied out of the fund provided for the payment of debts.—*Lomas v. Wright*, M. & K. 769.

#### MISREPRESENTATION.

A. the solicitor of a banking firm, in order to prevent the calling in of notes issued by the firm during the lifetime of B., the principal partner, induced the mother and guardian of B.'s infant son and heir at law, to abstain from proceedings to compel the payment of B.'s debts out of his property primarily liable, in exoneration of certain descended estates, by representing such proceedings to be unnecessary. A. afterwards filed a creditor's bill against the executor and devisee of B., and against his heir; A. was declared to be entitled to a decree against the personal and devised estates of B., but the bill, as against the heir, was dismissed with costs, on the ground that A., after having prevented the institution of proceedings which, according to the evidence in the cause, would have effectually secured the descended estates from B.'s debts, could not be permitted, in equity, to proceed against those estates. (*Dalbiac v. Dalbiac*, 18 Ves. 116.)—*Jones v. Waters*, 1 M. & K. 610.

#### NEXT OF KIN.

A. assigned a fund to trustees in trust to pay the interest to B. his brother, for life, and after his decease to pay, transfer, and assign the same among B.'s children, and if no child of B., from and immediately after B.'s decease, upon trust to pay, transfer, and assign the same as A. should appoint, and in default of appointment to pay, transfer, and assign the same to such persons as should at the time of A.'s decease be his next of kin. A. died in B.'s lifetime, without making any appointment, and B. died without issue: Held, that B. was not excluded from the benefit of the limitation to A.'s next of kin. *Elmsley v. Young*, M. & K. 788. 2. The words "next of kin," used simpliciter, do not signify those persons who would take under the Statute of Distributions, but the nearest in blood. (*Brandon v. Brandon*, 3 Swans. 312.)—S. C.

#### PLEADING.

1. (*Plea*.) A plea that the title of the plaintiff, stated by the bill, accrued in 1757, and that there had been possession adverse to him ever since, was overruled, because it did not state the facts on which the defendant meant to rely as constituting the adverse possession. (*Jones v. Davis*, 16 Ves. 262; *Evans v. Harris*, 2 V. & B. 361.)—*Hardman v. Ellames*, M. & K. 732.
2. (*Same*.) A plea of adverse possession to a bill charging possession of

documents, showing the plaintiff's title, must be supported by an answer denying that charge. (*M'Gregor v. East India Company*, 2 Sim. 452; *James v. Sadgrove*, 1 S. & St. 4.)—S. C.

3. (*Parties*.) A., one of the executors of the will of B., who died in India, proved the will and possessed his assets there; the widow and executrix of A., who also died in India, proved his will and possessed his assets there, and having afterwards come to England, was made a party to a suit for the administration of B.'s estate in India: Held, that a personal representative of A. in England was not a necessary party.—*Anderson v. Caunter*, M. & K. 763.

#### PORCTIONS.

T., by his marriage settlement, covenanted to secure upon certain estates an annuity of 400*l.* a year for his wife, in case she should survive him, in addition to the provision made for her by the settlement. He afterwards, by deed, granted to his wife an annuity of 400*l.* during her widowhood. By his will, he ratified and confirmed the settlement, and gave an annuity of 400*l.* to his wife during her widowhood, in addition to the provision made for her by the settlement: Held, that the settlement gave the wife an equitable grant of 400*l.* a year, and the subsequent deed gave only a legal security for the annuity; and that by the plain terms of the deeds and will she was entitled to two annuities of 400*l.*—*Douce v. Lord Torrington*, Y. & C. 600.

#### PRACTICE.

1. (*Parties*.) Some of the shareholders in a joint stock company having been joined as plaintiffs in a suit without their consent, an order was made, on their application, that their names should be struck out.—*Keppell v. Baily*, M. & K. 548.
2. (*Vendor and Purchaser*.) The Court will not, on motion, decide whether certain lots, forming part of the same property, and bought at a sale by one purchaser, are so connected in use and enjoyment, that the failure of title as to one will furnish a defence to a specific performance as to the rest.—*Casamajor v. Strobe*, M. & K. 722.
3. (*New Orders*.) The 21st of the last New Orders does not alter the former practice in respect of applications for time, where the Master gives no special direction.—*Judd v. Wartnaby*, M. & K. 813.
4. (*Foreign Sovereign*.) A foreign sovereign, suing in the Court of Chancery in England, must put in an answer to a cross-bill upon oath, as other suitors do. (*Colombian Government v. Rothschild*, 1 Sim. 94.)—*King of Spain v. Hullet*, Bl. 359.
5. (*Pro confesso*.) An order to take a bill pro confesso against a defendant who had been abroad, was discharged, and he permitted to put in an answer under peculiar circumstances.—*Lovell v. Hicks*, Y. & C. 230.
6. (*Injunction*.) After a decree for specific performance, while proceedings were pending in the Master's Office, the defendant brought an action for

damages arising out of the contract. On a supplemental bill, praying an injunction to restrain the action, it was granted specially, without the common injunction having been first obtained.—(*Reynolds v. Nelson*, 6 Mad. 294.)—*Frank v. Barnett*, M. & K. 618.

7. (*Production of documents.*) Where a document is in Court, its production will be ordered at the trial of an indictment against a person not a party to the suit.—*Taylor v. Sheppard*, Y. & C. 280.
8. (*Same.*) Where a document on which several actions have been grounded against the same party is in Court, in a suit by the party to restrain proceedings in one of the actions, its production will be ordered, on the application of that party, at the trial of another of the actions, though the plaintiff in the latter action is not a party to the suit in equity.—*S. C.*
9. (*Same.*) Where a defendant in his answer states a document admitted to be in his possession shortly or partially, but for greater certainty refers to it when produced, he will be ordered to produce it. (*Bettison v. Farrington*, 3 P. W. 363; *Marsh v. Sibbald*, 2 V. & B. 373.)—*Hardman v. Ellames*, M. & K. 745.
10. (*Rehearing.*) The answer of the Lord Chancellor to a petition of appeal relates to the day of presenting the petition. Where, therefore, a petition was presented within twenty-eight days after notice of the decree having been sent for the Lord Chancellor's signature, but in consequence of his absence in Scotland it was not answered until after the twenty-eight days had expired, the enrolment was vacated, on the ground that a party who had been guilty of no laches, should not be prejudiced by the Lord Chancellor's absence. (*Robinson v. Heydick*, 3 Mer. 13.)—*Richards v. Wood*, M. & K. 621.
11. (*Same.*) The common order for a rehearing, obtained on an application made more than six months after the decree had been pronounced, was discharged for irregularity; but on a special application by petition, supported by affidavit, a re-hearing was granted.—*M<sup>r</sup> Lachlan v. Rob*, Y. & C. 267.
12. (*Same.*) On a proper case, stated on petition, and supported by affidavit, the Court will grant a rehearing, though six months since the hearing have expired.—*Halford v. Halford*, Y. & C. 270.
13. (*Amending—Injunction.*) Exceptions to the answer to a bill of discovery for insufficiency having been allowed, the plaintiff obtained the common injunction to stay proceedings at law; on the same day the plaintiff obtained an order for liberty to amend, without prejudice to the injunction, and that the defendant should answer the exceptions and amendments at the same time. On a motion to extend the injunction to stay trial: Held, that the injunction to stay trial grew out of the common injunction; and that as the plaintiff, by amending, admitted that he had originally no case for an injunction, he could not place himself in a better situation; and the motion was refused. (*Brown v. Reina*, 3 Y. & J. 389.) *Mellor v. Cresswell*, M. & K. 616.

**PRINCIPAL AND AGENT.**

An agent having stood by and permitted his principal to lay out money in improving land, which the agent afterwards claimed as his own, and which his representative recovered in ejectment; the Court restrained an action brought by him for meane profits, the defendant admitting the principal to be entitled to some compensation in respect of his outlay.—*Lord Caudor v. Lewis*, Y. & C. 427.

**PRINCIPAL AND SURETY.**

1. A bond creditor having, by agreement with his principal, taken interest on his debt by anticipation, the Court restrained him from bringing an action against the surety. *Blake v. White*, Y. & C. 420.
2. An agent, employed to purchase an estate, becoming a purchaser for himself, is to be considered as a trustee for his principal.—*Lees v. Nuttall*, M. & K. 819.

**SALE.**

On a sale before the Master in lots, the proper fee, according to the regulations issued under the stat. 3 & 4 Will. 4, c. 94, is 3*l.*, if the produce of the whole number of lots does not exceed 1000*l.*, and 3*s.* on every 100*l.* beyond. (*Windsor v. Tyrrell*, L. C. Dec. 10th, 1834.)—*In the matter of Allen's Charities*, M. & K. 627.

**SETTLEMENT.**

By a marriage settlement, stock was assigned to trustees, upon trust to pay the dividends to the husband during the joint lives of himself and his wife; and in case he should survive his wife, upon trust to transfer the stock to him, his executors, administrators and assigns, to and for his or their own use and benefit; but in case the wife should survive, then upon trust to pay the dividends as she should appoint; and after her decease, upon trust to transfer the stock to the executors or administrators of the husband, to and for their own use and benefit. The wife survived the husband, and took out administration to him, and claimed the stock absolutely. Held, that the wife was not entitled absolutely.—*Marshall v. Collett*, Y. & C. 232.

**SPECIFIC PERFORMANCE.**

1. The plaintiffs had entered into an agreement with the defendants for a lease of thirty-one years of copyhold premises, of which it afterwards turned out a lease of twenty-one years only could be granted. On a bill by the plaintiffs for repayment of money laid out by them on the premises, and for a sale in satisfaction: Held, with reference to the peculiar circumstances of the case, that the plaintiffs should accept a lease for twenty-one years, and a covenant for a further term of ten years, with compensation for the difference in value between a legal term of thirty-one years, and a legal term of twenty-one and an equitable of ten; although the bill was framed with a view to a different relief, yet as this appeared on the whole statement of the bill to be the equity between the parties, the Court made



the decree under the prayer for general relief.—*Hanbury v. Lichfield*, M. & K. 629.

2. (*Uncertainty.*) A bill for a specific performance of an agreement to renew a lease, was dismissed, on the ground that it was too vague to be executed by the Court.—*Price v. Asheton*, Y. & C. 441.
3. (*Insolvency.*) The insolvency of the intended lessee is a ground for dismissing a bill filed by him to compel a specific performance of an agreement to renew a lease.—*S. C.*

#### STATUTE.

1. (1 W. 4, c. 60.) A reference under the statute 1 W. 4, c. 60, was directed on the petition of cestui que trust claiming in respect of interests devised in remainder, after the determination of prior estates tail which had failed. (Exp. Dover, 5 Sim. 500.)—*In the matter of the De Clifford Estates*, M. & K. 624.
2. (*Limitations.*) A judgment creditor who had allowed twenty years to elapse without taking steps to recover his debt, having ascertained that there was a suit pending by the specialty creditors of his debtor, in which they had received dividends, and that there was still money in Court, presented a petition for liberty to prove his debt before the Master: Held, that he was barred by the statute of limitations.—*Berrington v. Evans*, Y. & C. 434.

#### SWORN CLERKS.

1. (*Abolition of office.*) The office of sworn clerk in the Court of Exchequer is not abolished by any of the statutes, 11 G. 4, and 1 W. 4, c. 58, 11 G. 4, and 1 W. 4, c. 70, and 2 & 3 W. 4, c. 110. The object of the first was to abolish the custom of paying the officers by casual fees, and to provide for them a regular salary; of the second to abolish the monopoly of the attornies' business on the plea side of the Court of Exchequer; and the last distributed the duties of the officers of that Court, and gave them new names.—*Clark v. Richards*, Y. & C. 351.
2. (*Compensation.*) The compensation received by the sworn clerks of the Court of Exchequer under the provisions of the stat. 11 G. 4, and 1 W. 4, c. 58, is not given to them as attornies having enjoyed a monopoly of the business of the Court, but in lieu of fees formerly received by them as clerks of the Court.—*S. C.*

#### TRUST.

1. (*Costs.*) A trustee retaining a small balance in his hands for a short time only, will not, where no misconduct is shown, be charged with the costs of a suit instituted with unnecessary haste.—*Bennett v. Atkins*, Y. & C. 247.
2. (*Same.*) Where a trustee purchases trust property, and sells it at a profit, and is compelled by a suit in equity to refund the profit; he will not, under circumstances not affecting him with moral fraud, be charged with the costs of the suit.—*Baker v. Carter*. Y. & C. 250.
3. (*Trading.*) If a trustee mixes the trust money with his own, and carries on his trade with the mixed fund, the cestui que trust may have a de-

cree either for an account of the profits made by the trust money, or interest on the amount.—*Docker v. Somes*, M. & K. 655.

4. (*Breach of.*) Where by the terms of a settlement it appeared to have been the clear intention of the parties that there should be at all times two trustees of the property settled, a transfer to a single trustee in the place of the original trustees was held to be a breach of trust.—*Hulm v. Hulm*, M. & K. 682.

#### UNCLAIMED DIVIDENDS.

To obtain a re-transfer of stock under the provisions of the 56 G. 3, c. 60, it is sufficient for the petitioner to show his legal title.—*In re Bigg*, Y. & C. 245.

#### VENDOR AND PURCHASER.

1. (*Time.*) Time will, in equity, be considered as the essence of an agreement, wherever it can be collected that such was the real intention of the parties. But where the parties had stipulated that an abstract of title should be delivered immediately, and that in case the contract was not completed by a given day the purchaser should be released, and the abstract was not delivered, but communications on the title were kept up until the time limited by the contract had expired: Held, that the stipulation as to time had been waived by the purchaser. (*Seton v. Slade*, 7 Ves. 265.)—*Hipwell v. Knight*, Y. & C. 401.
2. (*Inclosure Act.*) An inclosure act, reciting that W. S. was entitled as lord of the manor to the soil and royalties, and, as lay rector, to all tithes both great and small arising within the manor, and that he claimed right of common in respect of the soil and royalties on the said waste land and common, directed allotments to be made to him in compensation for the soil of the waste land and common, and the tithes, and that the residue of the waste land should be divided amongst S. and the other persons having right of common upon such waste according to their claims; and it reserved to the lord the seignories and royalties. No mention was made of any right of warren in the lord, but there was evidence of W. S. having used part of the waste land as a rabbit warren. The award gave an allotment to W. S. for his right of warren, and then other allotments for his right to the soil, to the tithes, and of common and other rights and interests in the waste, and these allotments were declared to be a full compensation for all his right and interest in the lands directed to be inclosed: Held, that the title of W. S. to the warren allotment was not such as a purchaser could be compelled to take.—*Casamajor v. Strobe*, M. & K. 706.
3. (*Title.*) A testator devised lands in trust for the payment of his debts, with a direction that his estates at A. should be sold first, and if those should not be sufficient then his estates at B. The estates at B. having been sold first: Held, that it being doubtful whether the testator's debts were not all satisfied, a good title could not be made.—*Pierce v. Scott*, Y. & C. 257.

4. (*Copyholds.*) An equitable mortgage of copyholds may be created by deposit of the Court Rolls. (*Exparte Warren*, 19 Ves. 202; *Winter v. Lord Anson*, 3 Russ. 493.) It is therefore not sufficient for a mortgagee of copyholds to search the Court Rolls for incumbrances; the copy of the mortgagor's admission should be required.—*Whitbread v. Jordan*, Y. & C. 303.
5. (*Constructive Notice.*) Where a creditor of a publican took from the latter a legal mortgage of copyholds, knowing him to be indebted to his landlords (brewers), and of the custom of publicans depositing their leases with their brewers by way of mortgage; the copy of his admission not being forthcoming: Held, that an equitable security of the brewers had priority over the legal mortgage.—S. C.

## WILL.

1. (*Charge of debts on real estate.*) A testator began his will by directing all his just debts, funeral and other incidental expenses, to be paid with all convenient speed after his decease. By a codicil he devised a particular estate in trust, after payment of an annuity to his wife, and other payments, to apply the surplus in discharge of his simple contract debts: Held, that this did not constitute a charge upon his real estates generally. *Douce v. Lady Torrington*, M. & K. 600.
2. (*Same.*) A testator gave and devised all his freehold, copyhold and leasehold estates, and all the residue of his personal estate, after payment of his debts, and funeral and testamentary expenses, to trustees, their heirs, executors and administrators, upon certain trusts: Held, that the real estate was charged with the payment of debts. (*Shallcross v. Finden*, 3 Ves. 738.)—*Withers v. Kennedy*, M. & K. 601.
3. (*Exoneration.*) A testator directed certain estates to be sold, and the residue of the proceeds, after discharging mortgages, to be considered and applied as part of the residue of his personal estate; and gave and devised the residue of his real and personal estate upon trust, after paying his just debts, for the benefit of his children; and afterwards by a codicil confirmed the residuary gift of the proceeds of the estate directed to be sold, to his younger children: Held, that no intention appearing to exonerate the personal estate, the devisees of the estates directed to be sold were entitled to have the personal estate applied in payment of the mortgages: that pecuniary legatees were entitled to stand in the place of the mortgagees against the devised estates, so far as the latter had been paid out of the personal estate (*Forrester v. Leigh*, Ambl. 171): that the pecuniary legatees were not entitled to stand in the place of the vendor of an estate purchased by the testator, but not paid for, so far as the vendor had been paid out of the personal estate; though it would have been otherwise had the estate purchased descended instead of being devised. (*Clifton v. Burt*, 1 P. W. 678.)—*Whythe v. Henniker*, M. & K. 635.
4. (*Superstitious uses.*) A testatrix bequeathed sums to different Roman Catholic priests and chapels, desiring that they might be paid as soon as possible, that she might have the benefit of their prayers and masses; and

she gave the residue of her property to trustees upon trust to pay £10 each to the ministers of certain Roman Catholic chapels for the benefit of their prayers for the repose of her soul and that of her deceased husband, and that the rest might be appropriated by the trustees in such way as they should judge best for the promotion of the Catholic Christian religion among the poor and ignorant inhabitants of S. and W.: Held, that the gift of the residue was valid within the statute 2 & 3 W. 4, c. 115 (*Bradshaw v. Tasker*, 2 M. & K. 271): but that the gifts to priests and chapels were void; and that not being within the statute 1 Edw. 6, nor given for charitable purposes, the next of kin were entitled, and not the crown.—*West v. Shuttleworth*, M. & K. 684.

5. (*Wasting property*.) Where a testator limits his residuary property to one for life, with remainder over, it is to be presumed, *prima facie*, that he intended the property given to the tenant for life to go to those in remainder; and that if any part of the property be of a wasting nature, as leaseholds and long annuities, it should be immediately sold, and converted into permanent property, unless it appears upon the whole context of the will that the testator had not that meaning (*Howe v. Earl of Dartmouth*, 7 Ves. 137). In a case, therefore, where a testator gave the residue of his real and personal estate to his executor upon trust to permit his wife to receive the rents, profits, dividends and annual proceeds, to and for her sole use and benefit during life; and, after her decease, in trust to sell his freehold house and his leasehold houses by auction; and he desired that A. should be employed as auctioneer to convert the whole of his estate and effects into money, and to distribute the sum as mentioned in his will: Held, that the wife was entitled to enjoy for life the income of certain long annuities left by him.—*Alcock v. Soper*, M. & K. 699.
6. (*Same*.) Where a testator gave to his wife all and every part of his property in every shape, and without any reserve, and whatever manner it might be situated, for her natural life; and after her death, one half to certain persons, and the other half to be at the sole disposal of his wife: Held, that the wife was entitled to enjoy for life the whole property, including leaseholds, of which it partly consisted.—*Collins v. Collins*, M. & K. 703.
7. (*Leaseholds*.) Where it appeared from the whole will that the testator meant to comprise leaseholds in the description of real estate, they were held to pass. (*Hobson v. Blackburn*, 1 M. & K. 591.)—*Goodman v. Edwards*, M. & K. 760.
8. (*Charge of legacies*.) A testator cannot by a will duly executed reserve to himself a power to charge his real estate, or the produce of his real estate, with legacies given by an unattested codicil. (*Rose v. Cunningham*, 12 Ves. 37.)—*Whytall v. Kay*, M. & K. 765.
9. (*Construction*.) R. P. devised his estate to T. P. for life, and after his decease, to such of his relations of the name of P., being a male, as T. P. should by deed or will appoint; and in default of such appointment, to

such of his relations of the name of P. being a male, as T. P. should approve of or adopt, if he should be living at the death of T. P., and his heirs, executors, administrators, and assigns. And in case T. P. should not adopt any such male relation, or there should be no such male relation living at the decease of T. P., then to the next or nearest relation or nearest of kin of R. P. of the name of P., being a male, or the elder of such male relations, in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, executors, administrators, or assigns, for ever. R. P. had a brother, T. P., who had gone to sea, and had not been heard of for many years; and supposing him to have died without issue, the nearest relation of R. P. at his decease was T. P., and next to him the plaintiff. T. P. died without issue, and without having exercised the power of appointment or adoption given to him by the will: Held, by the Court of Exchequer, on a case sent, that T. P. took under the ultimate limitation, but the Master of the Rolls was dissatisfied with their opinion.—*Pearce v. Vincent*, M. & K. 800.

10. (*Perpetuity—Accumulation.*) H. B. by his will devised lands to trustees upon trusts for accumulation for 21 years; and he created a term in the trustees of 120 years if certain persons named, or either of them, should so long live; with a term in gross of 20 years upon trust after the expiration of the terms of 120 years and 20 years, that the lands should be conveyed by the trustees to such person as would be entitled to the same by purchase or descent, for the first or immediate estate for life, in tail or in fee in the same trust estates, as if they had been by the will devised, settled, or assured: to the use of the testator's nephew, G. B., for life, with remainder to his first and other sons successively in tail male, with similar remainder to other nephews and nieces; and he declared that the person to whom the conveyances should be made, should have such estate as he would at that time be entitled to under the limitations, if they had been actually made by his will, with the like remainders over as if the trust estates had been devised by his will in manner aforesaid, and that no such person should be entitled to a vested estate, or any other than a contingent interest, until the determination of the term of 120 years and of 20 years: Held, that the will was valid both as to the trusts for accumulation under the *Thelluson* act, and as to the limitations to take effect after the determination of the lives in being, and upon the expiration of a term of 20 years afterwards, as a term in gross, without reference to infancy or minority. (*Beard v. Westcott*, 5 Taunt. 392; *Lloyd v. Carew*, Show. P. C. 137.)—*Cadell v. Palmer*, Bli. 202.

11. (*Construction.*) A testator devised real estates to trustees upon trust that M. should receive 60*l.* a year until 21, if sole and unmarried; and should thereafter and until 31, if sole and unmarried, receive a further annuity of 40*l.*; but in case M. should marry without the consent of the trustees, then she should only receive an annuity of 50*l.*, and the estates should, on such marriage, be in trust for the children of M., under certain

limitations; and in default of such issue, in trust for S. Provided, that if M. should marry with such consent, the estates should be in trust for her and her husband, for their joint lives, and the life of the survivor, with remainder to the children of the marriage, under the same limitations as before.—M. married with the consent of the trustees, and died without issue. Held, that the estate limited over to S. was not conditional, on M.'s marrying without consent, but was absolute.—*Tolderoy v. Colt*, Y. & C. 240.

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## BANKRUPTCY.

[Containing 4 Deacon & Chitty, Part 2.]

### AFFIDAVIT.

1. (*Reference for scandal.*) Affidavits will be referred for scandal on a motion of course. (Exp. Williamson, 1 D. & C. 329; 2 D. & C. 414.)—*Exp. Hetherington*, 17.
2. (*Same.*) Any party may refer affidavits for scandal. (Exp. Simpson, 15 Ves. 476.)—*S. C.*
3. (*Swearing.*) It is no objection to an affidavit in bankruptcy that it is sworn before a Master in Chancery.—*S. C.*
4. (*Service.*) Service of a petition to stay a certificate is not properly supported, where the affidavit merely states inability to serve the bankrupt personally, but that the bankrupt's solicitor had acknowledged the bankrupt to be fully aware of the petition.—*Exp. Levy*, 224.

### ASSIGNEES.

1. (*Custody of proceedings.*) The majority of the assignees are clearly entitled to the custody of the proceedings.—*Exp. Holford*, 271.
2. (*Taxing solicitor's bill.*) An assignee applying to have a solicitor's bill taxed, for business done before the choice of assignees, and not included in the bill taxed by the Commissioner, the petition should state the nature of the business and when done, and the proceedings must be in Court.—*Exp. Cass*, 273.
3. (*New assignment.*) Where a commission has been issued prior to the 1 & 2 W. 4, c. 56, and an assignee has been removed subsequently, it is not necessary that there should be a new assignment, or that the prior assignment should be vacated. (Exp. Forster, 1 M. & B. 87.)—*Smith v. De Tastet*, 358.
4. (*Bidding.*) Before an assignee can have leave to bid at the sale of the bankrupt's property, he must procure the assent of the creditors.—*Exp. Molineux*, 460.

### BILLS OF EXCHANGE.

The bankrupt having shipped goods to A. and B. at Sydney, the petitioner accepted bills drawn by the bankrupt for the invoice price, on an agreement that the proceeds of the consignments should be received by the petitioner in discharge of his acceptances, and notice of the agreement was given to A. and B. Two bills remitted by A. and B. on account of

the proceeds of the consignments came into the hands of the assignees : Held, that the petitioner was entitled to the proceeds of these two bills, as well as to all future proceeds that might come to the hands of the assignees in respect of the consignments, in discharge of his acceptances.—*Exp. Flower*, 449.

# COSTS.

1. (*Petitioning creditor.*) A reference was made to the Commissioner to allow, on the taxation of the petitioning creditor's bill of costs, certain expenses incurred before adjudication by parties appointed by the creditors to act for the estate.—*Exp. Evans*, 392.
2. (*Same.*) The petitioning creditor is entitled to an inquiry whether any money has been received by the assignees from the bankrupt's estate, with a view to the payment of his costs.—*Exp. Abram*, 401.
3. (*Substitution of debt.*) On a petition for the substitution of a debt in lieu of the petitioning creditor's debt, under the 6 G. 4, c. 16, s. 18, the costs must be paid by the petitioning creditor.—*Exp. Hayne*, 413.

# EQUITABLE MORTGAGE.

1. (*Rents.*) Where the bankrupt, owner of property subject in part to an equitable mortgage, absconded shortly before the bankruptcy, and the mortgagee took possession of that part by an agent, and the solicitor to the fiat, on behalf of the creditors and the mortgagee, jointly appoint the same agent to manage the whole property, which appointment is afterwards confirmed by the assignees : Held, that the mortgagee, though he was also the petitioning creditor, was entitled to the rents and produce from the time of taking possession.—*Exp. Bignold*, 259.
2. (*Memorandum.*) A letter written some months after the deposit of title-deeds, acknowledging the purpose for which they were deposited, is a sufficient memorandum in writing to entitle an equitable mortgagee to his costs. (*Exp. Reid*, 1 D. & C. 250.)—*Exp. Reynolds*, 278.
3. (*Partners.*) The bankrupt kept an account with P., L. and E. G. as bankers, who afterwards admitted as a partner J. G.; after which the bankrupt executed a legal mortgage to P., L. and E. G. for securing the repayment of a loan. Subsequently the bankrupt addressed a letter to Messrs. P., L. and G., authorizing them to consider all the securities they then held as responsible for any advances made or to be made by them to the bankrupt : Held, that this letter amounted to an equitable mortgage to the four partners of the previous legal mortgage to the three, operating as a security for all advances made either by the three or the four.—*Exp. Parr*, 426.
4. (*Memorandum.*) Where, in a doubtful case, there is no memorandum accompanying the deposit of title-deeds, the Court leans against the deposit as a security for an antecedent debt, though it favours it as regards subsequent advances.—*Exp. Martin*, 457.

# EVIDENCE.

On a petition by the assignees to expunge a proof, the examination of the



bankrupt before the commissioners, taken at the time the proof was admitted, is receivable in evidence to show that the proof ought not to have been admitted.—*Exp. Freeman*, 400.

#### FIAT.

1. (*Altering date.*) The Court will not, on the application of the petitioning creditor, alter the date of the fiat to give him more time to prove the act of bankruptcy. (*Exp. Howes*, 3 D. & C. 493.)—*In the matter of Jacob*, 277.
2. (*Opening.*) Where the time for opening a fiat had expired, and a second fiat was issued by another party: the Court refused, in the absence of proof that the party issuing the second knew that the first was being prosecuted, or was guilty of fraud, to suspend the second. (*Exp. Baker*, 2 D. & C. 362.)—*Exp. Westall*, 350.
3. (*Payments on issuing.*) A creditor, whose debt arose on a bill of exchange, issued a fiat which he could not support, from inability to prove the loss of the bill, so as to let in secondary evidence of it; whereupon the assignees obtained an order for a renewed fiat on another creditor's debt: Held, that the petitioning creditor under the renewed fiat was not exonerated from making the payments required by the 41st and 46th sections of the Bankruptcy Court Act.—*Exp. Osborne*, 398.

#### INJUNCTION.

1. After repeated acts of acquiescence by a bankrupt in the validity of the commission, and the dismissal of a former petition to the Chancellor to supersede, the Court will restrain him from bringing actions against the assignees.—*Exp. White*, 279.
2. Where a bankrupt has lain by upwards of twenty years without attempting to upset the commission, the Court will, on very slight circumstances of acquiescence, restrain him from prosecuting actions against purchasers under the commission.—*Exp. Davy*, 322.

#### MORTGAGE.

The Court, on giving a mortgagee leave to bid, will not direct that he shall not be required to make a deposit.—*Exp. Tatham*, 360.

#### PETITION.

1. (*Service.*) As a general rule, a petition to stay a certificate must be served on the bankrupt two clear days before the day for which it is answered. But where a petition was answered for the 9th of December, and on the 7th the bankrupt's solicitor requested the petitioner's solicitor to postpone the hearing of the petition, and undertook to serve it on the bankrupt; semble, the bankrupt could not avail himself of the objection to service.—*Exp. Hetherington*, 217.
2. (*Advancing.*) A cross-petition by a bankrupt for the allowance of his certificate, will not be advanced on a motion of course, pending a reference for scandal of affidavits filed in answer to a petition to stay the certificate, on the ground that it was improperly served.—*S. C.*
3. (*Multifariousness.*) Multifariousness is not sufficient cause for dismissing a petition in all cases.—*Exp. Devas*, 366.

PRACTICE.

1. (*Staying certificate.*) Where on a petition to stay a certificate the petitioner does not appear, and the petition is dismissed, the certificate will not be ordered to go without the production of an affidavit that there is no collusion. (Re Hall, 2 D. & C. 44.)—*Exp. Hetherington*, 224.
2. (*Amending minutes.*) On a mistake by the Court in pronouncing, or by the officer in drawing up an order, application to amend the minutes may be made; but an alteration in the judgment of the Court can only be obtained by a petition for a rehearing.—*Exp. Soper*, 275.
3. (*Arrangement by consent.*) A reference was ordered to the commissioner to inquire whether an arrangement made by the assignees, and approved of by the creditors, touching part of the bankrupt's property, would be beneficial to the estate.—*Exp. Kirby*, 400.
4. (*New trustee.*) A new trustee was appointed without a reference on an affidavit of the fitness of the proposed trustee, where the property produced only £100 per annum. (*Exp. Inkersole*, 2 Y. & J. 230.)—*Exp. Beveridge*, 455.
5. (*Scandal.*) A motion to confirm a report as to scandal in affidavits, is a motion of course.—*Exp. Hetherington*, 221.
6. (*Notice to produce proceedings.*) Notice to produce the proceedings in the bankruptcy must be served on the assignees, and not on the bankrupt.—*Exp. Daly*, 364.
7. (*Discovery.*) A petitioner, claiming part of the bankrupt's property, cannot call for the production of a case stated by the assignees for counsel's opinion, in order to prove that the bankrupt had prevaricated in different statements.—*Exp. Collier*, 364.

PROOF.

1. (*Bills—Collateral security.*) G. and Co. to secure a continuing loan of £20,000 from V. and Co. their bankers, agreed to give their promissory note for that sum, and to deposit bills and securities to the amount of £10,000, which were to remain in the possession of V. and Co. until they became due; and V. and Co. received the amount; and bills, notes, and other securities to the amount of £10,000, to be used by G. and Co. during the day, and deposited with V. and Co. every night; and also to leave a balance of £4000 on the account every night. In pursuance of this agreement G. and Co. delivered every evening to V. and Co. bills and other securities, to the amount of £10,000 at least; and every morning received them again. On the 20th of September, 1834, G. and Co. informed V. and Co. that having drawn out the cash balance which they ought to have left in their hands, they had given additional security to V. and Co. by lodging bills and notes to a larger amount. The amount of the sum over-drawn was £3000, and of the bills and notes then deposited £22,666, including a note of hand of B. and Co. for £10,000, for which B. and Co. had only received a partial consideration from G. and Co.; but V. and Co. had no notice of such want of consideration. On the evening of this day a balance was due to V. and Co. of £35,386, for which they held the

deposit of the bills and notes (including the note for £10,000) to the amount of the £22,666, besides the note of G. and Co. for £20,000. G. and Co. afterwards stopped payment, when V. and Co. gave them a letter of licence, but which was subsequently recalled. On the 30th of September, 1834, B. and Co. became bankrupt: Held, that V. and Co. were entitled to prove for the whole amount of the note for £10,000 against B. and Co.'s estate. (Exp. Bloxam, 3 Ves. 448.) But as the bills were deposited with V. and Co. not to secure a general balance, but merely the two loans of £20,000 and £30,000, the bills deposited were to be considered as a collateral security for those two sums only: that the proceeds of the other bills and of G. and Co.'s joint note must therefore be deducted from the £22,000; and that V. and Co. were entitled to receive dividends on their proof against B. and Co.'s estate, until they should have been fully paid the unsatisfied balance of the latter sum. (*Vandeyer v. Willis*, 3 Bro. C. C. 21.)—*Exp. Vere*, 295.

2. (*Same.*) The holder of bills deposited by the bankrupts by way of collateral security for a debt proved the amount of the balance due, excepting the several bills as a security, subsequently to which some of the bills were paid in full: Held, that the amount of all the bills so paid must be deducted from the proof, and the dividends calculated upon the residue of the debt only. (Exp. Smith, 1 C. B. L. 155; Exp. Barratt, 1 Y. & J. 327.)—*Exp. Brunkett*, 442.
3. (*Co-executors.*) An executor may prove against his co-executor without an order for that purpose first obtained.—*Exp. Courtney*, 456.

#### REPUTED OWNERSHIP.

1. (*Notice.*) Where the bankrupt, being a director of a life assurance office, deposits a policy of the office with his bankers by way of security, one of the bankers being also an auditor of the office: Held, that this was sufficient notice of the transfer of the bankrupt's interest to prevent the claim of reputed ownership.—*Exp. Waithman*, 412.
2. (*Same.*) A party, to whom the bankrupt had assigned a policy of assurance, sent an agent to the office for the purpose of paying the premium, who in the course of conversation with one of the clerks in the office tells him of the policy having been so assigned: Held, that this was not sufficient notice to the insurance office, a clear and distinct notice being necessary. (Exp. Monro, Buck, 300.)—*Exp. Carlis*, 354.
3. (*Wife's property.*) Previous to the marriage of the bankrupt, all the property of his wife was settled in trust for her separate use, and she was to have all the rights and privileges of a *feme sole*. The property consists of a hotel, with the furniture, the business of which was entirely conducted by the wife, the bankrupt never living at or interfering with the management of it: Held, that possession was consistent with the settlement, and the property not in the reputed ownership of the bankrupt. (Exp. Martin, 2 Rose, 331; Exp. Howard, 2 Rose, 620.)—*Exp. Massey*, 405.

#### SPECIFIC PERFORMANCE.

The Court of Review has jurisdiction to enforce the specific performance of an

agreement for sale of the bankrupt's mortgaged property, sold under the usual order, against the purchaser of such property, and to decide on evidence adduced before it whether the title has been accepted. (*Exp. Gould*, 1 Y. & J. 231.)—*Exp. Barrington*, 461.

#### SUPERSEDEAS.

1. (*Composition*.) Where the bankrupt petitioned for a supersedeas under the 6 G. 4, c. 16, ss. 133, 134, and the commissioners had certified that all the requisites of the statute had been complied with, and stated the amount of debts of 20*l.* proved, the number of creditors who had proved, and the number and value of creditors consenting, the Court made the order, though the commissioners had omitted to state the exact fractional proportion under Lord Eldon's general order of June 27, 1826.—*Exp. Hinton*, 351.
2. (*Adjournment of examination*.) Where it appeared that the commissioners had adjourned the last examination of the bankrupt *sine die*, the Court refused to supersede on the petition of the bankrupt, with consent of creditors, without knowing the cause of the adjournment *sine die*.—*Exp. Gudge*, 358.
3. (*Second fiat*.) A commission issued in 1823, under which bankrupt never obtained his certificate, and a fiat issued in 1832. The Court refused to supersede the fiat, although void at law.—*Exp. Deras*, 366.
4. (*Usury*.) Though a fiat is fraudulently sued out, a creditor whose debt is tainted with usury cannot petition to supersede. (*Exp. Hudson*, 2 Russ. 456.)—*Exp. Jarman*, 395.

#### TAXATION.

1. (*Petitioning creditor's bill*.) Where the assignee's accounts had been audited, and the petitioning creditor's bill paid six years before, the Court refused to order a re-taxation by the registrar.—*Exp. Christy*, 414.
  2. (*Solicitor's bill*.) It is of course for any creditor who has proved to the amount of 20*l.*, and who is dissatisfied with the taxation of a solicitor's bill by the commissioners, to apply within a reasonable time, under the 14th section of the 6 G. 4, c. 16, for a re-taxation; but the Court held three years after payment of the bill not to be a reasonable time.—*S. C.*
  3. (*Same*.) A party appealing to the general jurisdiction of the Court, and pointing out objectionable items in a solicitor's bill, has a right as of course to a re-taxation.—*S. C.*
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## ABSTRACT OF PUBLIC GENERAL STATUTES.

(5 & 6 WILLIAM IV.—*continued.*)

CAP. 15.—An Act to continue until the Thirty-first Day of May, One Thousand Eight Hundred and Thirty-eight, and to the end of the then next Session of Parliament, the Allowances of the Duty of Excise on Soap used in certain Manufactures. [21st July, 1835.]

CAP. 16.—An Act for altering and amending the Law regarding Commitments by Courts of Equity for Contempt, and the taking Bills, *pro confesso*, in Ireland. [30th July, 1835.]

CAP. 17.—An Act to extend to Ireland certain Provisions of an Act made and passed in the First Year of his present Majesty's Reign, intituled *An Act for consolidating and amending the Laws relating to Property belonging to Infants, Femes Covert, Lunatics, and Persons of unsound Mind.* [30th July, 1835.]

CAP. 18.—An Act to exempt Carriages carrying Manure from Toll.

[30th July, 1835.]

CAP. 19.—An Act to amend and consolidate the Laws relating to the Merchant Seamen of the United Kingdom, and for forming and maintaining a Register of all the Men engaged in that Service. [30th July, 1835.]

S. 1. repeals 2 & 3 Ann. c. 6; 2 Geo. 2, c. 36; 2 Geo. 3, c. 31; 31 Geo. 3, c. 39; 45 Geo. 3, c. 81; 37 Geo. 3, c. 73; 58 Geo. 3, c. 38; 59 Geo. 3, c. 58; 4 Geo. 4, c. 25; and 3 & 4 Wm. 4, c. 88.

S. 2. No master of any ship trading beyond seas, or of any British registered ship of 80 tons or upwards employed in the fisheries of the United Kingdom, or trading coastwise or otherwise, shall carry to sea in any voyage from any place, any person as one of his crew or complement (apprentices excepted) without a written agreement, specifying the seaman's wages, the capacity in which he is to act, and the nature of the intended voyage; such agreement to be dated, and signed by the master in the first instance, and by the seamen respectively at the ports where they are shipped; the master to cause the agreement to be read over to every such seaman before signature, or in the presence of the respective attesting witnesses.

S. 3. Such agreements to be drawn according to forms set forth in the schedule of the Act; the owners or masters of ships going beyond seas, on arrival at the port of destination in the United Kingdom to deposit with the collector of customs a copy of such agreement; and the owners of fishing ships, or ships trading coastwise or to any port on the continent of Europe, within ten days after six months ending June 30 or December 31, to deposit with the collector of the port to which such ships belong, a copy of every such agreement entered into within the preceding six months; such copies to be legal proof on the part of any seaman.

S. 4. Master carrying any seaman (apprentices excepted) without such agreement, to forfeit £10 for each; neglecting to cause agreement to be read to each seaman, to forfeit £5; neglecting to deposit copy with the collector, or depositing a false copy, to forfeit £50.

S. 5. Seamen, by such agreement, not to be deprived of usual legal remedies for the recovery of wages; no agreement contrary to this Act, or any clause whereby a seaman shall forego his right to wages in case of freight earned by ships subsequently lost, to be valid; seaman not bound to produce such agreement in support of his claim.

S. 6. Seamen refusing to join or proceed in the ship may, on complaint, be committed to gaol by one justice, and kept to hard labour for not more than thirty days; provided that, on his consenting to proceed on the voyage, the justice, at the request of the master, may cause him to be conveyed on board, and may award costs not exceeding 40s.

S. 7. Seamen in cases of temporary absence from duty without leave, to forfeit two days' pay for every twenty-four hours' absence, or, at the option of the master, the amount incurred in hiring a substitute; in case of neglect of reasonable duty to be subject to a like forfeiture; and seamen quitting the ship without leave after arrival at port of delivery, and before discharge of cargo, to forfeit one month's pay, provided that an entry of such absence or neglect of duty be entered in the log-book, and proved by a credible witness.

S. 8. provides the mode of ascertaining the amount of forfeiture where seamen contract for the voyage.

S. 9. In case of absolute desertion seamen to forfeit their effects on board and all their wages, provided the circumstances of desertion be entered in the log-book at the time and certified by the master and another credible witness; in cases of desertion beyond seas master may recover, by summary proceeding, increased wages paid to a substitute.

S. 10. Persons harbouring deserters to forfeit £10. No debt exceeding 5s., contracted after agreement, recoverable from seamen until the voyage is ended; seamen's effects not to be detained by keepers of lodging-houses under pretence of debt; one justice may, in case of detention, by warrant cause such effects to be seized and delivered to seamen.

S. 11. provides for the payment of wages within a certain period after discharge of seamen.

S. 12. Such payment to be valid notwithstanding bill of sale of such wages; and no assignment or sale of wages prior to the earning thereof, to be binding on the party making it.

S. 13. Masters to give seamen certificates of service and discharge, and in default to forfeit £5.

S. 14. If any seaman, after he has been discharged three days, desires to proceed on another voyage, one justice, on proof that he would be prevented from employment by delay, may summon the master, and order immediate payment; in default of such payment, master to forfeit £5.

S. 15. Where seamen's wages not exceeding £20 are due, one justice may make an order for the payment, and in case the order is not obeyed

within two days, may issue a distress warrant to levy the amount on the goods of the party liable; and in case sufficient distress cannot be found, may cause the amount to be levied on the ship in respect of which the wages are due; and if the ship is not within the jurisdiction of the justice, may commit the party to gaol, there to remain without bail until payment of the amount and costs; the decision of such justice to be final.

S. 16. Where a suit is instituted in a superior Court for recovery of wages, if the plaintiff could have had as effectual a remedy by a complaint to a justice, the judge may certify, and deprive the plaintiff of costs.

S. 17. Where a ship, except in cases of wreck or condemnation, is sold at a foreign port, the master, in addition to payment of their wages, to provide seamen with employment on board some British vessel homeward bound, or to send them home, depositing with the consul a sum sufficient for their subsistence and passage; if the master shall refuse to do so, the owner, except in cases of barratry, to be liable at the suit of the consul or the attorney-general.

S. 18. A proper supply of medicines to be kept on board ships going abroad, and seamen in the service of the ship to be provided with advice and medicine at the expense of the owner.

S. 19. Register office for seamen to be established in the port of London.

S. 20. Letters to and from registrar to be free from postage.

S. 21. Masters of ships trading abroad, on arrival at their port of destination at home, to deliver to the collector of customs a written account, signed by themselves, of all seamen (including apprentices) who shall have belonged to their ships at any time during absence from the United Kingdom, such account to be according to a form in the schedule annexed in this Act.

S. 22. Masters of ships employed in the home trade to make similar returns within twenty-one days after June 30 and December 31 in each year, according to a form in the schedule annexed to this Act.

S. 23. In case of ships lost or sold abroad, such returns to be made as soon as possible after the loss, and within twelve calendar months after sale.

S. 24. The several accounts and returns to be transmitted from the collector to the registrar; master for wilfully neglecting to furnish such accounts to forfeit £25.

S. 25. Effects of British seamen dying abroad to be sold by consent for the benefit of next of kin; in case no claim be made within three months, amount to be remitted to the governors of the corporation for the relief of disabled mariners in the merchant service; if seamen dying leave effects on board ship, and they are not claimed by the executor within one month after ship's return to the United Kingdom, masters are to deposit them with the governors aforesaid.

S. 26. Overseers may put out parish boys, who have attained thirteen years of age, to be apprentices in the sea service; such binding to be in presence of two justices, who are to execute indenture in testimony of their having been satisfied that the boy has attained the age of thirteen, and is

of sufficient health and strength; age of boys to be inserted in the indenture.

S. 27. Parish apprentices bound on shore may, with their own consent and the concurrence of two justices, be turned over to the sea-service.

S. 28. On the death of the master his executor may assign the indenture to another master.

S. 29. Parish officers to prepare indentures and transmit them in duplicate to the registrar in London, or collector of any other port at which the master shall be; parish officers to send apprentices by constable, and to pay the master £5 for sea clothing and bedding.

S. 30. Counterparts of indentures to be executed in the presence of registrar in London or collector elsewhere, and by the constable who conveys apprentices, who is to take the counterpart back to the parish officers.

S. 31. Masters of ships, clearing outwards, to have a number of apprentices according to tonnage; 80 tons and upwards, one at least; 200, two; 400, three; 500, four; 700, five; all bound under seventeen years of age, and for four years at least; master to forfeit £10 for each default.

S. 32. Apprentices not liable to contributions to hospitals.

S. 33. Registrar at London and collector at other ports to keep a register of indentures and assignments of parish apprentices.

S. 34. Indentures of voluntary apprentices to be in like manner registered; masters, with their or their guardian's consent, may assign them; such assignments to be registered.

S. 35. Agreements with the crew and indentures of apprenticeship under this Act exempt from stamp duty.

S. 36. Masters neglecting to have indentures registered, or allowing apprentices to quit their service, to forfeit £10.

S. 37. Two justices at any port may determine claims of apprentices under their indentures, or complaints of ill-usage, and on the misbehaviour of the apprentices.

S. 38. Two justices may summarily punish assaults committed at sea; fines imposed to be paid to the Merchant Seaman's Hospital.

S. 39. Apprentices not to enter into the naval service without master's consent; but in case of his consent, master entitled to receive the apprentices' wages when the ship is paid off.

S. 40. Masters of ships forcing on shore or leaving behind, in any place abroad, any of his crew, deemed guilty of a misdemeanor; offence may be prosecuted by information or indictment in any criminal Court where the master shall be; such Court may issue a commission for the examination of witnesses out of its jurisdiction.

S. 41. Masters not to discharge seamen abroad without the sanction of the governor, consul or other proper officer, as the case may be.

S. 42. Nor to leave seamen abroad on the plea of incapacity, injured, desertion or disappearance, without a certificate from such officer.

S. 43. If any of the crew are left behind, in any instance, the proceedings the proof of such sanction or certificate to be upon the master.

S. 44. When seamen are lawfully discharged, the master to receive from

consul or other officer an account of wages due, and pay the same either in money or a bill on the owner; master delivering no account or a false one, to forfeit £25 in addition to the wages due.

S. 45. This Act not to prevent seamen from entering into the navy.

S. 46. Seamen quitting merchant ships to enter into the navy, to be entitled to the immediate delivery of their clothes and effects, and to payment of wages due; master to deliver them up under a penalty of £25. If no freight has been earned, master to give a bill on the owner payable at the ship's arrival at her destined port. The officer of the king's ship to give to the master a certificate of seamen's having entered into the naval service.

S. 47. The crown may sue for expenses incurred in the subsistence or conveyance home of seamen left abroad.

S. 48. Masters on arrival at foreign ports to deliver to the consul the agreements with their crew, to be returned before their leaving the port; master neglecting to deliver agreement to forfeit £25.

S. 49. No seaman to be shipped at a foreign port without the privity of the consul, under a penalty of £25.

S. 50. Masters to produce the muster roll and agreements with their crew to officers of king's ships, under a penalty of £25.

S. 51. Registrar and collectors at home and abroad may require the production of muster roll and agreement, and may take copies thereof; master refusing to comply to forfeit £25.

S. 52. Meaning of the words "master," "seaman," "ship," and "owner," as used in this Act, defined.

S. 53. Penalties imposed by this Act, and for the recovery of which no specific mode is provided, may be recovered by summary proceeding before one justice, if not exceeding £20; if exceeding £20, in any of the king's courts of record at home or abroad; amount, where not otherwise provided for, to be paid one-half to the informer, the other half to be divided between Greenwich Hospital and the Merchant Seaman's Hospital; court may reduce penalties one-half; proceedings to be commenced within two years of offence, if committed beyond Cape of Good Hope or Cape Horn; if on this side, within six months.

S. 54. This Act not to extend to ships belonging to any British colony having a legislative assembly.

CAP. 20.—An Act to consolidate certain Offices in the Collection of the Revenues of Stamps and Taxes, and to amend the Laws relating thereto. [30th July, 1835.]

CAP. 21.—An Act to amend and alter an Act of the Fifty-ninth Year of his late Majesty King George the Third, for vesting in Commissioners the Line of Road from Shrewsbury, in the County of Salop, to Bangor Ferry, in the County of Carnarvon; and for discharging the Trustees under the said Act of the 17th, 28th, 36th, 41st, 42d, 47th and 50th Years of the said late Majesty, from the future Repair and Maintenance thereof; and for amending as aforesaid of the said Act as affects the said Line of Road. [30th July, 1835.]



**CAP. 22.**—An Act to continue for Three Years, and from thence to the end of the then next Session of Parliament, Two Acts of the Second and Third Year and the Third and Fourth Year of his present Majesty, relating to the Care and Treatment of Insane Persons in England.

[21st August, 1835.]

The Acts of 2 & 3 W. 4, c. 107, and 3 & 4 W. 4, c. 64, to be continued for the Term of Three Years.

**CAP. 23.**—An Act for the Establishment of Loan Societies in England and Wales; and to extend the Provisions of the Friendly Societies' Acts to the Islands of Guernsey, Jersey and Man.

[21st August, 1835.]

S. 1. Persons forming societies for loans, who shall be desirous of having the benefit of this Act, shall cause their rules to be certified and enrolled as hereinafter directed.

S. 2. Rules to be certified, deposited and enrolled at sessions pursuant to 4 & 5 W. 4, c. 40.

S. 3. Such rules to be entered in a book to be kept by an officer of the society; which book shall be open for inspection of persons receiving assistance, and shall be binding on them and their representatives, as well as on sureties for the re-payment of loans; a copy of such entry to be evidence of the rules in all cases; no certiorari allowed for removing the rules into any of his Majesty's courts of record; copies of rules deposited to be made without fee, except the actual expense of making the copy.

S. 4. All property of the society to be vested in the trustees for the time being without assignment or conveyance, who may bring and defend actions in their own names as such trustees without further description; such proceedings not to abate in consequence of the death or removal of the trustees.

S. 5. Treasurer or other officer, if required by the rules, to give security by bond to the clerk of the peace; and in case of forfeiture trustees may sue in the name of the clerk of the peace; such bond not to be subject to stamp duty.

S. 6. No loan to any one individual to exceed £15; nor any second loan to be made till the former one is repaid.

S. 7. No note or security for the re-payment of loans, nor any other instrument required by the rules of the society, to be liable to stamp duty.

S. 8. Notes and securities to be made payable to the treasurer or clerk; and on default of payment seven days after demand made, one justice of the peace may, on complaint made, summon the party liable, and award the sum found due to be paid with costs not exceeding 10s.; and in default of payment may, by warrant under his hand and seal, cause the same to be levied by distress, together with the costs thereof.

S. 9. Trustees may receive five per cent. per annum interest on loans.

S. 10. Stat. 10 Geo. 4, c. 56, as amended by 4 & 5 W. 4, extended to Guernsey.

S. 11. This Act to be deemed a public Act.

**CAP. 24.**—An Act for the Encouragement of the Voluntary Enlistment of Seamen, and to make Regulations for more effectually manning his Majesty's Navy.

[21st August, 1835.]

CAP. 25.—An Act to extend the Accommodation by the Post to and from Foreign Ports, and for other Purposes relating to the Post Office.

[21st August, 1835.]

CAP. 26. An Act for the Appointment of convenient Places for the holding of Assizes in Ireland.

[21st August, 1835.]

CAP. 27. An Act to continue and amend certain Regulations for the Linen and Hempen Manufactures in Ireland.

[21st August, 1835.]

CAP. 28.—An Act for removing Doubts as to the Declaration to be made and Oaths to be taken by Persons appointed to the Office of Sheriff of any City or Town being a County of itself.

[21st August, 1835.]

No person chosen to the office of sheriff of any city or town being a county of itself, shall, by reason thereof, be liable to make the declaration required by the 9 Geo. 4, c. 17, but to take, make and subscribe all oaths and declarations required of sheriffs of counties.

CAP. 29.—An Act for investing in Government Securities a Portion of the Cash lying unemployed in the Bank of England belonging to Bankrupts' Estates, and applying the Interest thereon in Discharge of the Expenses of the Court of Bankruptcy, and for the Relief of the Suitors in the said Court; and for removing Doubts as to the Extent of the Powers of the Court of Review and of the Subdivision Court.

[21st August, 1835.]

S. 3. Lord Chancellor to appoint an accountant in bankruptcy.

S. 4. Funds belonging to bankrupts' estates to be transferred from the name of the accountant-general to the accountant in bankruptcy.

S. 5. So much of 6 Geo. 4, c. 16, as directs the filing of the certificate, and the investment, division and payment of unclaimed dividends, repealed.

S. 6. All unclaimed dividends and undivided surplus to be paid into the Bank to the credit of the accountant in bankruptcy, subject to the order of the Lord Chancellor, court of review, or a commissioner for the payment of dividends.

S. 7. Unclaimed dividends in the hands of assignees to be paid to creditors, or a certificate of the names of the creditors to whom they are due to be filed with the secretary of bankrupts; certificate of undivided surplus to be filed in like manner; and within one year the amount to be paid into the Bank to the "Unclaimed Dividend Account."

S. 8. Accountant to give certificates to the assignees, on production of which the Bank of England shall receive the sums therein mentioned, and give receipts for the same.

S. 21. Court of bankruptcy in future to consist of one chief judge and two judges.

S. 23. In case of the non-attendance of one or more of the commissioners of a subdivision court to which a cause is referred, the remaining commissioner or commissioners may call in any of the commissioners of the other subdivision court.

S. 24. The court of review, subdivision courts, judge, or commissioner, may administer oaths on affidavits in matters of bankruptcy, where they may be now administered by a master in chancery.

S. 25. Court of review and subdivision courts declared to have been

courts of record from the passing of 1 & 2 W. 4, c. 56, and every judge or commissioner sitting alone to have all the powers, privileges, and exemptions of a court of record; provided that they shall not have power to impose fines or commit for contempt of court, but every contempt shall be cognizable by the court of review.

S. 28. This Act to be a public Act.

CAP. 30.—An Act for protecting the Revenues of vacant ecclesiastical Dignities, Prebends, Canonries, and Benefices without Cure of Souls, and for preventing the Lapse thereof, during the pending Inquiries respecting the State of the Established Church in England and Wales.

[21st August, 1835.]

S. 1. Profits of dignities or benefices without cure of souls becoming vacant during the existence of the ecclesiastical commission, to be paid to the treasurer of Queen Anne's Bounty; such treasurer to have full power to enforce payment of such profits; but not to grant leases, or to present to benefices having cure of souls.

S. 2. Treasurer to keep a separate account of the receipts, and to allow all outgoings which would have fallen on the deceased incumbent, and all expenses incurred in the receipt, or in enforcing payment.

S. 3. This Act not to apply to dignities or benefices now vacant, the profits of which have been already appropriated according to the customs of the respective cathedrals or collegiate churches.

S. 4. This Act not to prevent patrons from appointing to vacant dignities or benefices, if they shall think proper to do so.

S. 5. Where a benefice with a cure of souls in the patronage of any vacant dignity shall become vacant, the patron of such dignity may appoint.

S. 6. The right of presentation to any vacant dignity or benefice not to lapse; provided that the patron shall give notice to the commissioners, who shall transmit a copy thereof to the treasurer of Queen Anne's Bounty, who is thereupon to collect the profits.

CAP. 31.—An Act to give Effect and Validity to certain Contracts and Presentments for Repairing and Keeping in Repair certain Public Roads in Ireland, and the Sureties entered into for the Execution thereof.

[21st August, 1835.]

CAP. 32.—An Act to impose certain Duties on Tea. [21st August, 1835.]

CAP. 33.—An Act for preventing the vexatious Removal of Indictments into the Court of King's Bench; and for extending the Provisions of an Act of the fifth year of King William and Queen Mary, for preventing Delays at the Quarter Sessions of the Peace, to other Indictments; and for extending the Provisions of an Act of the seventh year of King George the Fourth, as to taking Bail in Cases of Felony.

[21st August, 1835.]

S. 1. No writ of certiorari shall issue to remove indictments or presentments from inferior courts into the Court of King's Bench, at the instance of the prosecutor, without leave from that Court.

S. 2. Instead of the recognizance now required before the allowance

of a writ of certiorari, defendants, before allowance of the writ to them, shall enter into a recognizance before a judge of the Court of King's Bench, or a justice where the charge is charged to have been committed, in such case as the judge or justice shall by indorsement direct; such recognizance to contain the conditions required by the 5 & 6 W. & M. c. 11, and 8 & 9 W. 3, c. 33, on removal of indictments from the sessions; the provisions of such Acts, with respect to costs, to extend to such recognizances.

S. 3. Two justices, of whom one has signed the warrant of commitment, may admit persons charged with felony to bail, according to the Act 7 G. 4, c. 64, in such sum, and with such sureties, as they shall think fit, notwithstanding such persons shall have confessed the matter charged.

CAP. 34. An Act to amend two Clerical Errors contained in an Act passed in the ninth year of the reign of his late Majesty King George the Fourth, intituled "An Act for consolidating and amending the Laws in Ireland relative to Larceny and other Offences connected therewith."

[25th August, 1835.]

CAP. 35.—An Act for consolidating the Offices of Paymaster-General, Paymaster and Treasurer of Chelsea Hospital, Treasurer of the Navy, and Treasurer of the Ordnance.

[25th August, 1835.]

CAP. 36.—An Act to limit the time of taking the Poll in Boroughs at contested Elections of Members to serve in Parliament, to one Day.

[25th August, 1835.]

S. 1. So much of 2 & 3 W. 4, c. 45, as allows the poll at contested elections in cities, boroughs, and towns, to be kept open two days, is repealed.

S. 2. The polling to commence at eight in the morning, and close at four in the afternoon of the same day.

S. 3. Not more than 300 voters to poll at each booth.

S. 4. On the requisition of a candidate, his proposer or seconder, not more than 100 voters to poll at each booth; provided that such candidate or elector shall pay all extra expenses.

S. 5. In case of such requisition, the returning officer shall forthwith give notice of the situation of booths.

S. 6. No elector shall be required to take the oaths of allegiance, abjuration, supremacy, or any other oath in lieu thereof.

S. 7. Liverymen of London entitled to vote in respect of premises in the city, may vote at the booth for the district where the premises are situate.

S. 8. In case of riot, the returning officer to adjourn the poll to the next day, and, if necessary, from day to day.

S. 9. This Act not to apply to Ireland or Scotland.

CAP. 37.—An Act for the further Reduction of the Militia Staff, and to suspend the Ballot for the Militia.

[25th August, 1835.]

CAP. 38.—An Act for effecting greater Uniformity of Practice in the Government of the several Prisons in England and Wales; and for appointing Inspectors of Prisons in Great Britain.

[25th August, 1835.]

S. 1. Rules for the government of the prisons to be approved only as hereinafter provided.

S. 2. Rules to be made by justices or others shall be submitted to one of the secretaries of state, who may alter or add to them, and certify his approval; whereupon they shall be binding upon sheriffs and all other persons: no rules shall be enforced until so certified.

S. 3. Justices may commit offenders for safe custody to any house of correction near the place where the assizes and sessions are to be holden at which the trial is to take place; the keeper of such house of correction to furnish lists of persons for trial.

S. 4. Persons convicted of offences punishable with death, transportation, or imprisonment, may be committed to a house of correction.

S. 5. Clerks of the peace and of gaol sessions, and magistrates of places now having a prison, shall transmit copies of rules to a secretary of state, on or before the 1st of November in every year, together with any new rules proposed; and such secretary may alter or add to them, and certify his approval. Clerks of the peace, &c. to lay copies of prison rules before the court of quarter sessions held next after the 25th of September in every year.

S. 6. If clerks of the peace, &c. neglect to transmit such rules to the secretary of state, he may certify what rules are to be in force for the government of such prisons.

S. 7. Secretary of state may appoint not more than five inspectors of prisons; and every inspector may examine persons holding office in such prisons, and inspect books and inquire generally; and every such inspector shall report to the secretary of state on the state of every prison visited by him, on or before the 1st of February in every year; a copy of such report to be laid before parliament.

S. 8. Persons obstructing inspectors, on conviction before one justice, to forfeit not exceeding 20*l.*; in default of payment, to be committed to prison for not more than one calendar month.

S. 9. Justice, on complaint made, may summon offenders.

S. 10. Secretary of state may visit or authorize any person to visit prisons.

S. 11. His Majesty may direct prisoners under sentence to be removed from one prison to another.

S. 12. Where the term of imprisonment expires on the Lord's day, the prisoner is to be discharged on the preceding Saturday.

S. 13. The power given by 4 & 5 W. 4, c. 36, to the king, to direct persons sentenced to imprisonment for offences committed beyond the limits of that act to be removed to the penitentiary, extended to offences committed within the limits of the said act.

S. 14. Powers given by any act for the regulation of the penitentiary extended to all persons removed to and confined in the said penitentiary, under this or the above-recited act.

S. 15. 800 male convicts may be confined in the penitentiary, instead of 600, as limited by 59 Geo. 3, c. 136.

CAP. 39.—An Act to exempt certain Retailers of Spirits to a small amount from the additional Duties or Licences; and to discontinue the Excise-survey on Wine, and the use of Permits for the Removal thereof.

[31st August, 1835.]

CAP. 40.—An Act to provide for the better Collection of the Duties on Wood, the Produce of Places in Europe.

[31st August, 1835.]

CAP. 41.—An Act to amend the Law relating to Securities given for Considerations arising out of Gaming, usurious, and certain other illegal Transactions.

[31st August, 1835.]

S. 1. So much of the several Acts 16 Car. 2, c. 7, 10 W. 3 (Ireland), 9 Ann. c. 14, 11 Ann. (Ireland), 12 Ann. st. 2, c. 16, 5 Geo. 2. (Ireland), 58 Geo. 3, c. 93, 11 & 12 Geo. 3 (Ireland), 45 Geo. 3, c. 72, and 6 Geo. 4, c. 4, as enacts that any note, bill, or mortgage shall be absolutely void, is repealed; but nevertheless such note, bill or mortgage shall be deemed to have been given for an illegal consideration, and such Acts shall have the same effect as if they had provided that every such note, bill, or mortgage should be deemed to have been given for an illegal consideration; provided that this Act shall not prejudice any note, bill, or mortgage which would otherwise have been good.

S. 2. If any person shall give a note, bill, or mortgage for any consideration on account of which the same is by the said recited Acts declared to be void, and such person shall pay to the holder of such securities money secured thereby, such money shall be deemed to be paid on account of the person to whom the security was originally given, and shall be recoverable from him.

S. 3. So much of the recited Acts of 9 & 11 Anne as enacts that securities shall enure for the benefit of parties in remainder, is hereby repealed.

CAP. 42.—An Act to authorize the granting of Superannuation Allowances to the Commissioners and Officers of the Courts for the Relief of Insolvent Debtors.

[31st August, 1835.]

CAP. 43.—An Act for enlarging the Powers of Magistrates in the appointment of Special Constables.

[31st August, 1835.]

Persons willing to act as special constables under the 1 & 2 W. 4, c. 41, may be appointed, notwithstanding they are not resident in the parish or its neighbourhood; and shall have the same powers and privileges, and be subject to the same duties, as special constables under the recited Act.

CAP. 44.—An Act for raising the Sum of thirteen Millions five Hundred twenty-one Thousand five Hundred and fifty Pounds by Exchequer Bills, for the Service of the year 1835.

[31st August, 1835.]

CAP. 45.—An Act to carry into further execution the Provisions of an Act passed in the third and fourth years of his present Majesty, for compensating Owners of Slaves upon the Abolition of Slavery.

[31st August, 1835.]

CAP. 46.—An Act to amend, until the end of the next Sessions of Parliament, an Act of the second year of his present Majesty, for making Provision for the Dispatch of the Business now done by the Court of Exchequer in Scotland.

[31st August, 1835.]

CAP. 47.—An Act to repeal so much of an Act passed in the third and fourth years of his present Majesty, as relates to the Amount of the Salary

granted to the Clerk of the Crown in Chancery ; and to make other Provisions in relation to the said office. [31st August, 1835.]

CAP. 48.—An Act for the better Prevention and more speedy Punishment of Offences endangering the public Peace in Ireland. [31st August, 1835.]

CAP. 49.—An Act for continuing, until the first day of June, 1837, the several Acts for regulating the Turnpike Roads in Great Britain which will expire on the first day of June, 1836, or with the next Session of Parliament. [31st August, 1835.]

All Acts for making, amending, and repairing any Turnpike Roads in Great Britain which will expire June 1, 1836, or with the next Session of Parliament, shall be continued until June 1, 1837.

CAP. 50.—An Act to consolidate and amend the Laws relating to Highways in that part of Great Britain called England. [31st August, 1835.]

S. 1 repeals part of 6 Geo. 1, c. 6 ; 18 Geo. 2, c. 33 ; 24 Geo. 2, c. 43 ; 30 Geo. 2, c. 22, (except as to London) ; the whole of the 13 Geo. 3, c. 78, 34 Geo. 3, c. 64 ; 34 Geo. 3, c. 74 ; part of 42 Geo. 3, c. 90 ; and the whole of 44 Geo. 3, c. 52 ; 54 Geo. 3, c. 109 ; and 55 Geo. 3, c. 68.

S. 2. Not to revive Acts repealed by any of the above-mentioned.

S. 3. Not to interfere with contracts heretofore made under the repealed Acts, nor to prevent the recovery of penalties under them.

S. 4. Present surveyor to continue to act until a surveyor is appointed under this Act.

S. 5. Interpretation in clause.

S. 6. Inhabitants of parishes to elect their own surveyor annually ; outgoing surveyor to act until his successor is appointed, and may be re-elected.

S. 7. Any person living in the parish, or in an adjoining parish, and having lands to the value of 10*l.* a year, or personal estate of 100*l.*, or being tenant to the yearly value of 20*l.*, may be elected surveyor : persons exempted from the office of overseer need not accept the office of surveyor ; surveyor may appoint a deputy, to be approved of at a special sessions for the highways.

S. 8. Person chosen surveyor, and refusing to act or provide a deputy, to forfeit not exceeding 20*l.* ; deputy to have same powers and liabilities as surveyor.

S. 9. Majority of inhabitants may appoint a surveyor with a salary.

S. 10. Surveyor on passing his accounts to give to the justices the name and residence of his successor.

S. 11. If no surveyor is appointed by any parish, or if a surveyor refuses to act or becomes disqualified, justices may appoint one with or without salary.

S. 12. When a parish is situated in more than one county, such surveyor shall be appointed by the justices in the county where the parish church is situate.

S. 13. Parishes may direct application to be made to justices at sessions for forming two or more parishes into districts with one surveyor.

S. 14. Justices may unite such parishes into districts, and appoint one district surveyor.

S. 15. Names of parishes and district surveyor to be enrolled at the quarter sessions, and a copy sent to each of the churchwardens ; united parishes

to form a district for three years, and until twelve months after any one parish shall give notice of intention to cease to form one of such district.

S. 16. District surveyor to have powers and be liable to the duties of surveyor under this Act, but not to expend monies levied in one parish for benefit of another; district surveyor's salary to be paid by each parish as agreed.

S. 17. In united parishes a surveyor to be appointed to make and levy rates.

S. 18. In parishes where the number of inhabitants exceeds 5000, a board for directing repairs, not exceeding twenty nor less than five, may be appointed; such board may appoint collectors, an assistant surveyor and clerk, and fix salaries.

S. 19. Board may hire or purchase premises for the keeping of implements and materials.

S. 20. Surveyor neglecting duty to forfeit a sum not exceeding 5*l*.

S. 21. Highways adjoining bridges hereafter built at expense of any county to be repaired by the parish; but county to repair walls, fences, and raised causeways.

S. 22. Powers hereby vested in surveyors for getting materials and preventing nuisances to extend to surveyors of county bridges and roads at the ends thereof.

S. 23. No new road to be a highway which the parish shall repair, unless the party making it gives three months' notice to the surveyor, and makes it the width required by this Act, of which the surveyor and two justices shall give a certificate to be enrolled at the quarter sessions; but the parish may question the utility of such highway, and the justices at a special sessions may determine thereupon.

S. 24. Surveyors to erect direction posts.

S. 25. Surveyor may use adjoining ground as a temporary road during the repair of a ruinous or narrow part of a highway, recompensing the occupier or proprietor for all damage done.

S. 26. Surveyor to remove snow and other obstructions.

S. 27. Surveyor to make a rate for the purposes of this Act, to be allowed by two justices.

S. 28. Surveyor may inspect poor-rate book, and obtain copies or extracts.

S. 29. Road rate to contain the names of occupiers and description of property rated; rate not to exceed 10*d*. in the pound, nor 2*s*. 6*d*. in one year, without consent of the rate-payers.

S. 30. Surveyors may enforce composition for rates in parishes where overseers may do so.

S. 31. Surveyor with consent of justices at a special sessions may rectify errors in rates.

S. 32. Justices may direct persons to be excused from payment of highway rate, on the ground of poverty.

S. 33. Persons hitherto exempt from statute duty or highway rate, to be still exempt.



S. 34. Surveyors to have same remedies for the recovery of rates as overseers have for poor rates.

S. 35. Rate-payers having teams may divide amongst themselves the conveyance of materials for repair of highways, and be paid by the surveyor.

S. 36. Surveyor with consent of vestry may appoint a collector of highway rates.

S. 37. To take security from collector for the due execution of his office.

S. 38. Collector to make out accounts of all monies received under this Act, and of defaulters, and to pay monies received to the surveyor; in default thereof, two justices may order the amount to be levied by distress on his goods, or commit him for not more than six months; if collector's default was wilful, he may be fined not more than 20*l.*, or imprisoned for four months.

S. 39. Surveyor to keep separate accounts of monies levied for the highway rate.

S. 40. Surveyor to keep books and account of monies received and paid, to be open for the inspection of rated inhabitants.

S. 41. All books, materials, and implements to be vested in the surveyor for the time being.

S. 42. Surveyor within fourteen days after leaving office to deliver books, money due, tools, and materials to his successor, or forfeit 5*l.*; and in case of default in accounting for money, to forfeit double the amount.

S. 43. In case of death of surveyor, his executors to account, and deliver up books, &c.

S. 44. Yearly accounts to be made by surveyors and laid before the justices at a special sessions for the highways; accounts may be objected to, and complaints examined by the justices; surveyors appointed under 13 Geo. 3, c. 78, to pass their accounts at a special sessions to be holden after March 25, 1836.

S. 45. Justices to hold not less than eight nor more than twelve special sessions every year, for the purposes of this Act: at the sessions held next after March 25, surveyor to verify accounts and make returns of the state of the roads, repairs done, &c.

S. 46. Surveyor with consent of vestry may contract for getting and carrying materials; but not to share in any contract or dispose of materials without a licence from two justices, under a penalty of not more than 10*l.*

S. 47. Persons taking materials belonging to surveyor to forfeit not more than 10*l.*

S. 48. Land allotted to parish for materials, when exhausted, may be sold.

S. 49. Tenants for life, corporations, trustees, &c. may renounce damages for ground or materials occupied for highways.

S. 50. Persons enfeoffed of lands for maintenance of highways to let them to farm at the most improved value, with the consent of justices at special sessions.

S. 51. Surveyor may dig for and procure gravel and other materials, in any waste or common land, river or brook, so as no damage is done thereby, and may gather stones on lands in the parish without making satisfaction, but satisfaction to be made for damages done in carrying them away; no such stones to be gathered without consent of the owner, or licence from two justices at a special sessions.

S. 52. Not to extend to materials on the sea beach where the removal would be likely to occasion inundation.

S. 53. Surveyor to give notice before taking materials from private lands, and if the owner shows cause against it, two justices to decide thereon.

S. 54. If sufficient materials cannot be found in waste lands, &c. surveyor, with licence of justices, may take them from inclosed lands, making satisfaction to the owners.

S. 55. If surveyor, in getting materials, shall make pits or holes, he shall have them filled up, or sloped down and fenced off; or in case of neglect therein, to forfeit 10s. for every default, and neglecting after six days' notice, to forfeit not exceeding 10l.

S. 56. Surveyor leaving any heap of stone on the highway at night, so as to occasion danger, to forfeit not exceeding 5l.

S. 57. Surveyor causing damage to mills, dams, or other works, by digging materials, to forfeit not exceeding 5l.

S. 58. Where a highway lies in two parishes, justices to determine what part shall be repaired by each; in case of such highway, part of which is to be repaired by any party by reason of tenure of lands, such party may object before justices, who shall decide.

S. 59. Parishes and parties bound to repair the part so allotted.

S. 60. Costs of such last-mentioned proceedings to be defrayed according to the apportionment of the justices.

S. 61. Boundaries not to be changed except for the purposes of repairing such portions of the highway.

S. 62. Highway repaired by party by reason of the tenure of lands may be made a parish highway; the party, by order of justices, paying a fixed proportion of the expense, or a sum certain in discharge of all claims.

S. 63. The middle of that part of the highway, which has been usually repaired with stones, to be deemed the centre of the highway for the purposes of this act.

S. 64. No tree to be planted within 15 feet of the centre of the carriage-way.

S. 65. If hedges, or trees (not ornamental or for shelter) prejudice highways, justices at special sessions may order them to be cut or removed.

S. 66. Persons not compelled to cut hedges except between September 30, and March 31, nor to fell oak trees except in April, May, or June, or other trees except from December to March.

S. 67. Surveyor to make and keep open drains, and to lay trunks, &c. through adjoining lands, paying for damage, if any incurred.

S. 68. Owner or occupier not to alter such drains or trunks, &c. without consent of surveyor.

S. 69. Persons encroaching on highway to forfeit not exceeding 40s. and the encroachment to be removed by the surveyor at the expense of the offender.

S. 70. Pits, shafts, steam-engines, &c. not to be sunk or erected within fifty yards of the highway.

S. 71. Proprietors of railways to erect gates thereon, where they cross highways.

S. 72. Persons committing nuisances on footpaths or damaging or obstructing highways, to forfeit not exceeding 40s. beyond the damage.

S. 73. Matters laid on or near highway, so as to be a nuisance, to be removed on notice; or on failure, surveyor to dispose of the same by order of a justice.

S. 74. Surveyor to impound cattle found straying on highways, until payment of 1s. penalty and expenses; if penalty is not paid within five days after notice to the owner, two justices may order the cattle to be sold for payment; but this act not to take away any right of pasturage.

S. 75. Persons guilty of pound-breach to forfeit not exceeding 20l. on conviction before two justices.

S. 76. Owner's name and address to be painted on all waggons, carts, &c. as herein mentioned, under a penalty not exceeding 40s. with or without costs.

S. 77. One driver may take charge of two carts, provided they are drawn only by one horse each.

S. 78. Drivers of waggons or carts not to ride thereon, without some other person to guide them; drivers causing hurt or damage to others, or quitting the road, or driving without owner's name, or not keeping the near side, or interrupting free passage, to forfeit 20s.; if the owner, 40s.: if driver will not give his name, justice may commit him for not more than three months.

S. 79. Surveyor may cause unknown persons offending against this act to be seized and taken before a justice.

S. 80. Cartways leading to market towns to be at least 20 feet wide; public horseways 8 feet, and footways 3 feet.

S. 81. Gates across public cartways to be not less than ten feet wide, across horseways five feet.

S. 82. Justices may order narrow highways to be widened, so as not to exceed 30 feet; but may not pull down buildings or encroach on pleasure grounds; surveyor to agree with the owner of the land to be taken into the highway, and if they cannot agree the value may be assessed by a jury at the quarter sessions; on payment of the money assessed, the ground to be deemed a public highway; where the surveyor has not money sufficient to pay the value of such land, a further rate may be made, but not exceeding one-third of the rate authorized by this act.

S. 83. If jury give more than the sum offered by the surveyor, he is to

pay the costs of proceedings; if the same sum or less, the vendor is to pay the costs.

S. 84. Previous to a highway being stopped up, or turned, the surveyor is to apply to two justices to view the same.

S. 85. When the justices shall, on such view, think it more commodious to turn such highway, or that it need not be kept open, and the owner of land shall consent, public notices and advertisements shall be given for four weeks, with the plans and reasons for it, and justices' certificate, which shall be left with the clerk of the peace and enrolled at the quarter sessions.

S. 86. Where it is proposed to stop up or divert two highways connected together, they may be both included in one order or certificate.

S. 87. The Court, on appeal, may confirm the certificate wholly or in part.

S. 88. Persons who think themselves aggrieved by the proposed alteration may appeal.

S. 89. In case of appeal, jury at sessions to determine the matter, and the Court to order accordingly.

S. 90. Court to direct surveyor to pay the costs of appeal.

S. 91. If no appeal be made, or if made, is dismissed, the Court may make order for the alteration, and thereafter the new highway shall continue a public highway.

S. 92. The party liable to repair the old highway, to repair the new highway.

S. 93. Provisions as to widening highways, to extend to all highways which persons are bound to repair by reason of tenure; but surveyor to repair after such highway is widened, two justices fixing the annual or other amount payable by the party before bound to repair.

S. 94. Justices at special sessions may fine surveyor or the party liable 5*l.*, for leaving highway in bad repair, and fix the time for its being put in repair; but may not make such order where the duty of repairing is in question.

S. 95. If the obligation to repair is disputed, the justices may direct the party to be indicted at the quarter sessions or assizes.

S. 96. Penalties for not repairing, or not appearing to an indictment, to be applied to the repair of the highway.

S. 97. Justices may order costs to be paid on conviction, or acquittal under this act.

S. 98. Court may award costs to the prosecutor of an indictment, where the defence is frivolous or vexatious.

S. 99. In future no presentment to be allowed against inhabitants for highway being out of repair.

S. 100. Inhabitants and officers of parish competent witnesses.

S. 101. Justices may proceed by summons for the recovery of penalties, without written information.

S. 102. Witnesses compellable to attend and give evidence before justices under a penalty not exceeding 5*l.*

S. 103. Forfeitures, costs, and charges may be levied by distress and

sale; one half of penalties to go to the informer, except where the surveyor informs, the other for repairs of highway.

S. 104. Distress not be deemed unlawful for want of form in the proceedings, but party aggrieved may recover satisfaction for special damages, plaintiff not to recover for irregularity, trespass, or wrongful proceedings, if sufficient tender of amends be made.

S. 105. Persons aggrieved may appeal to the next quarter sessions against rate, order, or conviction made by justices under this act.

S. 106. In cases of appeal against rate the provisions of 41 Geo. 3, c. 23, to be applicable.

S. 107. Rates and proceedings not to be quashed for want of form.

S. 108. In case of appeal, the sessions may grant a special case.

S. 109. Actions for things done under this act not to be brought until after 21 days' notice in writing, nor after tender of sufficient amends, nor after three calendar months; defendant may plead the general issue, and in case of nonsuit, verdict, or judgment in his favour, entitled to costs as between attorney and client.

S. 110. Specifies the amount of fees to be taken for things done under this act.

S. 111. Expenses of defending prosecutions against a parish, agreed upon at a vestry meeting to be paid out of the highway funds; and if necessary an additional rate to be levied.

S. 112. This act not to affect the provisions of 57 Geo. 3, c. 29, nor local acts for the same purposes.

S. 113. Nor to extend to turnpike roads, except where expressly mentioned, or to roads under local acts.

S. 114. Not to affect the rights of the universities of Oxford and Cambridge.

S. 115. Nor the rights and liberties of the City of London.

S. 116. Nor the act 1 Geo. 4, c. 7.

S. 117. Not to affect the powers of commissioners of sewers.

S. 118. Forms of proceedings, with variations suited to particular exigencies, to be according to the forms in the schedule of this act.

S. 119. This act to commence from March 20, 1836.

CAP. 51.—An Act for granting Relief to the Island of Dominica, and to amend an Act of the second and third years of his present Majesty, for enabling his Majesty to direct the issue of Exchequer Bills to a limited Amount for the purposes therein mentioned. [31st August, 1835.]

CAP. 52.—An Act to authorize the Court of Directors of the East India Company to suspend the execution of the Provisions of the Act of the third and fourth William the Fourth, Chapter 85, so far as they relate to the Creation of the Government of Agra. [31st August, 1835.]

CAP. 53.—An Act to repeal an Act of the ninth year of his late Majesty, for regulating the Carriage of Passengers in Merchant Vessels from the United Kingdom to the British Possessions on the Continent and Islands of North America; and to make further Provision for regulating the Carriage of Passengers from the United Kingdom. [31st August, 1835.]

CAP. 54.—An Act to render certain Marriages valid, and to alter the Law with respect to certain voidable Marriages. [31st August, 1835.]

S. 1. Marriages before the passing of this act between persons within the prohibited degrees of affinity, not to be annulled for that cause, except in suits depending at the time of the passing of this act: this enactment not to affect marriages between persons within the prohibited degrees of consanguinity.

S. 2. All marriages in future between persons within the prohibited degrees of affinity or consanguinity, to be absolutely void.

S. 3. This Act not to extend to Scotland.

CAP. 55.—An Act for facilitating the Appointment of Sheriffs in Ireland, and the more effectual audit and passing of their Accounts; and for the more speedy return and recovery of Fines, Fees, Forfeitures, Recognizances, Penalties and Deodands; and to abolish certain Offices in the Court of Exchequer in Ireland; and to amend the Laws relating to Grants in custodian and recovery of Debts in Ireland; and to amend an Act of the second and third years of his present Majesty, for transferring the Powers and Duties of the Commissioners of public Accounts in Ireland, to the Commissioners for auditing the public Accounts of Great Britain.

[9th September, 1835.]

CAP. 56.—An Act to regulate the Admeasurement of the Tonnage and Burthen of the Merchant Shipping of the United Kingdom.

[9th September, 1835.]

CAP. 57.—An Act to extend to Scotland certain Provisions of an Act of the ninth year of His late Majesty, to consolidate and amend the Laws relating to Savings Banks; and to consolidate and amend the Laws relating to Saving Banks in Scotland.

[9th September, 1835.]

CAP. 58.—An Act to amend the Acts relating to the hereditary Land Revenues of the Crown in Scotland.

[9th September, 1835.]

CAP. 59.—An Act to consolidate and amend the several Laws relating to the cruel and improper Treatment of Animals, and the Mischiefs arising from the Driving of Cattle, and to make other Provisions in regard thereto.

[9th September, 1835.]

S. 1. repeals 3 Geo. 4, c. 71; and part of 3 W. 4, c. 19.

S. 2. Any person wantonly and cruelly beating or otherwise ill-treating any cattle or domestic animal, or improperly driving cattle, whereby any mischief shall be done by such cattle, shall, on conviction before one justice, forfeit (beyond the amount of damage, if any,) not more than 40s., nor less than 5s., or in default be committed to prison for not more than fourteen days. This act not to abridge remedy by action against the employer, where the amount of damage is not sought to be recovered under this Act.

S. 3. Persons keeping pits for fighting dogs, baiting bears, and fighting cocks, liable to a penalty not exceeding 5*l.* nor less than 10*s.* for every day: the manager, receiver of the money, or person assisting, to be deemed the keeper, and liable to the penalties.

S. 4. Parties impounding cattle to provide sufficient food for them; and entitled to recover double the value of the food supplied, by summary proceeding before one justice; or instead of proceeding in that way, may, after

seven days from the time of impounding, sell such cattle at any public market (after three days public printed notice), and apply the produce in payment of the food and expenses of sale, rendering the overplus to the owner.

S. 5. In case cattle shall be impounded twenty-four hours without sufficient food, any person may enter the pound for the purpose of feeding them.

S. 6. Persons impounding cattle and neglecting to feed them, to forfeit 5*s.* for every day, recoverable by summary proceeding before one justice.

S. 7. Persons keeping houses for slaughtering horses or cattle (not for butchers' meat), and not taking out a licence for that purpose, and not having affixed over the outer entrance to their premises the board prescribed by 26 Geo. 3, c. 71, to forfeit not more than 5*l.* nor less than 10*s.*

S. 8. Horses, &c. bought for that purpose, to be slaughtered within three days after purchase, and in the meantime to be provided with food: if any such horse is employed in any work, or not properly fed, the person receiving it to forfeit not more than 40*s.* nor less than 5*s.* for every day.

S. 9. Any constable or peace officer, or the owner of any cattle, may seize offenders against this act, and convey them before a justice, who shall forthwith examine witnesses on oath.

S. 10. Persons so apprehended, and refusing to discover their name and place of abode, to be committed to prison for one calendar month, or until they shall make known their name and abode.

S. 11. Prosecutions under this act to be commenced within three months; the evidence of the complainant, or interested parties, admissible.

S. 12. In case sums awarded as damages or penalties imposed, are not paid on conviction, or at such period as the justice shall appoint, he may commit the offender to gaol for not more than fourteen days, where the sum and penalty with costs shall not exceed 5*l.*; or for not more than two months where it does exceed 5*l.* The commitment to determine on payment.

S. 13. One justice, where no other mode of proceeding is adopted, may, on information within fourteen days, summon the party accused, and proceed to examine and adjudicate in the matter.

S. 14. Gives the form of conviction.

S. 15. Summons or a copy may be served personally, or be left at the party's usual place of abode.

S. 16. Constable refusing to serve summons or execute warrant, on conviction before one justice to forfeit not exceeding 5*l.*, or be imprisoned for not more than one month, unless penalty is sooner paid.

S. 17. Penalties imposed under this act to be paid one half to the parish, the other to the informer or prosecutor; damages to the party injured.

S. 18. Informants, complainants, and interested persons to be competent witnesses.

S. 19. Actions brought for any thing done under the authority of this act, to be commenced within one month; and to be tried in the county where cause of action arises: fourteen days' notice to be given to the defendant before action commenced, who may plead the general issue, and give special matter in evidence, or may tender amends, or pay money into court. If

plaintiff neglects the above provisions, or defendant tender sufficient amends, verdict shall be for defendant; and in that case, or nonsuit, or judgment, or demurrer, defendant shall recover costs as between attorney and client; but plaintiff, on verdict for him, only on the judge's certificate.

S. 20. Parties dissatisfied with the adjudication or conviction of a justice, may appeal to the next quarter sessions.

S. 21. defines certain terms used in this act.

CAP. 60.—An Act for carrying into effect a Treaty with the King of the French and the King of Sardinia for suppressing the Slave Trade.

[9th September, 1835.]

CAP. 61.—An Act for carrying into effect the Treaty with the King of the French and the King of Denmark for suppressing the Slave Trade.

[9th September, 1835.]

CAP. 62.—An Act to repeal an Act of the present Session of Parliament, intituled, "An Act for the more effectual Abolition of Oaths and Affirmations taken and made in various Departments of the State, and to substitute Declarations in lieu thereof, and for the more entire suppression of Voluntary and Extra-judicial Oaths and Affidavits;" and to make other Provisions for the Abolition of Unnecessary Oaths.

[9th September, 1835.]

S. 1. repeals 5 Will. 4, c. 8.

S. 2. Lords of the Treasury may substitute a declaration in lieu of an oath, in matters connected with certain government offices and public establishments.

S. 3. The substituted declaration to be published in the London Gazette; and after twenty-one days from the date thereof, the provisions of this act to apply.

S. 4. After such period no oath to be administered in lieu of which such declaration has been directed.

S. 5. Persons making false declarations in matters relating to the revenues of customs or excise, stamps and taxes, or post office, to be deemed guilty of a misdemeanor.

S. 6. Oath of allegiance still required.

S. 7. Oaths in courts of justice and in summary proceedings before magistrates still to be taken.

S. 8. Universities of Oxford and Cambridge, and all other bodies corporate and politic, may substitute a declaration in lieu of an oath.

S. 9. Churchwardens and sidesmen, on entering office, to make a declaration in lieu of an oath: not to take any oath on quitting office.

S. 10. Persons acting in turnpike trusts, to make declaration in lieu of an oath or affidavit.

S. 11. Same provision with respect to persons taking out patents.

S. 12. And to pawnbrokers; penalties as to oaths imposed by acts relating to pawnbrokers to apply to declarations by them.

S. 13. Justices and others not to administer oaths touching any matter whereof they have no jurisdiction by statute; but this not to extend to oaths in matters touching the preservation of the peace, or the prosecution of



offences, or proceedings before either house of parliament, or to cases where the laws of any foreign country require an oath for the validity of instruments to be used there.

S. 14. Declaration substituted for oaths and affidavits required by the Bank of England on the transfer of stock.

S. 15. Declaration substituted for oaths and affidavits required by 5 Geo. 2, c. 7, and 54 Geo. 3, c. 15, relating to suits in the colonies.

S. 16. Declaration in writing sufficient to prove the execution of any will, codicil, deed, or instrument.

S. 17. On suits in the colonies on behalf of the crown, witnesses may be examined by declaration.

S. 18. Justices and others may receive voluntary declarations in the form in the schedule annexed to the act: persons making false declaration guilty of a misdemeanor.

S. 19. Fees payable on oaths to be payable on substituted declarations.

S. 20. All declarations substituted for oaths to be in the form prescribed in the schedule.

S. 21. Persons making false declarations to be deemed guilty of a misdemeanor.

S. 22. This act to take effect from the first of October, 1835.

CAP. 63.—An Act to repeal an Act of the fourth and fifth year of his present Majesty, relating to Weights and Measures, and to make other Provisions instead thereof. [9th September, 1835.]

CAP. 64.—An Act to alter certain Duties of Stamps and assessed Taxes, and to regulate the Collection thereof. [9th September, 1835.]

S. 2. Stamp duty on policies of insurance on lives not exceeding 100*l.*, repealed.

S. 3. Where the sum insured does not exceed 50*l.* duty to be 2*s.* 6*d.*; where under 100*l.*, 5*s.*

S. 7. Members of the four Inns of Court may be admitted in any other of the said Inns, free of duty.

CAP. 65.—An Act for preventing the Publication of Lectures without consent. [9th September, 1835.]

S. 1. Authors of lectures, or their assigns, to have the sole right of publishing them: persons publishing lectures without leave of the author or his assigns, or selling such unauthorized publication, to forfeit the copies, with one penny for every sheet found in his custody; the one moiety thereof to go to the crown, the other to the plaintiff; to be recovered by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege, or more than one imparlance shall be allowed.

S. 2. Printers or publishers of newspapers, printing or publishing lectures without leave, liable to same penalties.

S. 3. Persons having leave to attend lectures, not on that account licensed to publish them.

S. 4. This Act not to prohibit the publication of lectures after the expiration of the copyright, under the 8 Ann. c. 19, and 54 Geo. 3, c. 156.

S. 5. This act not to extend to lectures, of the delivering of which notice shall not have been given to two justices within five miles of the place of delivery, nor to lectures delivered in any university, public school, or college, or any public foundation.

CAP. 66.—An Act to amend the Law relating to the Customs.

[9th September, 1835.]

CAP. 67.—An Act for the improvement of the Navigation of the River Shannon.

[9th September, 1835.]

CAP. 68.—An Act to defray the Charge of the Pay, Clothing, and contingent and other Expenses of the disembodied Militia in Great Britain and Ireland: and to grant Allowances in certain Cases to Subaltern Officers, Adjutants, Paymasters, Quartermasters, Surgeons, Assistant-surgeons, and Serjeant-majors of the Militia, until the first day of July, 1836.

[9th September, 1835.]

CAP. 69.—An Act to facilitate the Conveyance of Workhouses, and other Property of Parishes, and of Incorporations or Unions of Parishes in England and Wales.

[9th September, 1835.]

S. 1. The commissioners of woods and forests, with the consent of the lord high treasurer, and guardians and overseers of parishes or unions, under the direction of the poor law commissioners, and lay or ecclesiastical corporations, and feoffees or trustees to charitable or other uses, and persons beneficially entitled in possession as tenant in fee, fee tail, or for life, or for a term of years whereof not less than four hundred are unexpired, and subject to no equity of redemption or rent, and married women entitled for their separate use, and guardians, trustees, or committees, of infants, married women, and lunatics, or under any other disabilities, may dispose of lands or buildings, by sale or exchange, for the purposes of this act.

S. 2. Purchase money to be paid to the accountant-general of the court of Exchequer, under petition or notice, to be by him invested in the purchase of real-estates or government securities, and settled to the same uses as the estates sold were subject to: in cases of questions of title, persons in possession deemed to be entitled, until the contrary is shown to the court of Exchequer: court may order guardians or overseers to pay the expenses of purchase, payment, or application to the court.

S. 3. Guardians and overseers may, with the approbation of the commissioners, sell, exchange, or otherwise dispose of lands or other property belonging to the parish or union; and apply the produce towards the purchase or building of workhouses, or in payment of debts contracted, or otherwise for the permanent advantage of such parish or union: commissioners may direct the mode and proportions in which purchase money is to be raised, and paid. Provided that no such sale or exchange shall take place without consent of a majority of the rate-payers: provided also that all sales or exchange heretofore made with consent of the commissioners shall be valid.

S. 4. Powers given to guardians and overseers to enclose waste or forest lands, by the acts 22 Geo. 3, c. 83; 59 Geo. 3, c. 12; 1 & 2 Will. 4, c. 42; 1 & 2 Will. 4, c. 59, and 2 & 3 Will. 4, c. 42, extended to

guardians of unions, and overseers of parishes not united, subject to the regulations of the commissioners.

S. 5. Powers given to justices by 59 Geo. 3, c. 12, to deliver possession of parish houses and lands to churchwardens and overseers, extended to property belonging to unions.

S. 6. Conveyances to be made according to the forms in the schedule of the act, or under the direction of the commissioners, and to be valid without livery of seisin, or bargain and sale; every conveyance to be approved and registered by the commissioners.

S. 7. Guardians of unions incorporated, and entitled to purchase lands, and bring actions in their corporate name and capacity.

S. 8. Lands or other property heretofore conveyed, with the consent of the commissioners, to persons in trust for unions or parishes, to vest in the guardians as such corporation without any further act.

S. 9. Clause defining words used in this act.

CAP. 70.—An Act for abolishing in Scotland, imprisonment for Civil Debts of small Amount. [9th September, 1835.]

CAP. 71.—An Act for appointing Commissioners to continue the Inquiries concerning Charities in England and Wales, until the first day of March, 1837. [9th September, 1835.]

S. 1. The king may issue a commission to any number of persons not less than thirty, empowering them to examine into the nature and management of charities; and who are to make a report half-yearly.

S. 2. Where funds cannot be applied to their destined purposes, commissioners are to report the special circumstances.

S. 7. Commissioners to hold sittings, and to have power to summon persons, and to call for the production of papers; so as no such person shall be obliged to travel more than ten miles to attend the commissioners.

S. 8. Commissioners may examine persons on oath.

S. 9. Examinations and papers to be transmitted to their office in Westminster.

S. 10. Persons swearing falsely liable to the penalties against perjury.

S. 11. Persons refusing to appear before commissioners, or to produce deeds or papers in their possession, or to answer questions, liable to be fined by the Court of King's Bench or Exchequer.

S. 12. Purchasers, without notice, not bound to answer interrogatories or produce deeds.

S. 13. Mortgagees, trustees, or agents not compellable to produce deeds without notice to mortgagors, cestui que trusts, or principals; persons not compellable to criminate themselves.

S. 14. Letters to and from commissioners exclusively relating to this act to be free of postage, if directed conformably thereto, viz. to the "Commissioners of Charities," at their office in Westminster, or, "Office of Commissioners of Charities, &c."

S. 15. Officers having custody of records, to furnish extracts, if required by a commissioner.

S. 16. This act not to extend to the Universities of Oxford or Cambridge, or to public schools, or to funds belonging to Jews, or Quakers, or Roman Catholics.

S. 17. Nor to charities supported chiefly by voluntary contributions; except as to the management and application of rents for the last twenty years or upwards.

S. 18. Attorney-general's certificate of the particulars of cases having been duly certified by the commissioners, to be sufficient evidence in proceedings under the 59 Geo. 3, c. 81, or 2 Will. 4, c. 57, or under this Act.

S. 19. The chief commissioner to superintend all proceedings instituted by the attorney-general under the recited acts.

S. 20. Where rent-charges belonging to charities do not exceed 50*l.* per annum, and there are no existing trustees, five commissioners may empower resident ministers and churchwardens to receive the same; and they may use all remedies for compelling payment.

S. 21. Actions against commissioners, or persons acting under their authority, for any thing done under this act, to be commenced within six months; defendant may plead the general issue, and give special matter in evidence; defendant on verdict or judgment for him entitled to treble costs.

S. 22. Previously to presenting reports, the commissioners may direct the attorney-general to file informations.

S. 23. This act to be in force until March 1, 1837.

CAP. 72.—An Act for abolishing the Excise Incorporation in Scotland, and for transferring the Funds of the said Corporation to the Consolidated Fund, and providing for the payment of the Annuities to the Widows and Orphans of late and present Members of the Corporation Fund.

[9th September, 1835.]

CAP. 73.—An Act to provide that Persons accused of Forgery in Scotland shall not be entitled to Bail, unless in certain Cases. [9th September, 1835.]

CAP. 74.—An Act for the more easy Recovery of Tithes.

[9th September, 1835.]

S. 1. Proceedings for the recovery of tithes under 10*l.* (except in the case of Quakers), shall be had only under the powers of the acts of 7 & 8 Will. 3, c. 8, and 53 Geo. 3, c. 127: if under 50*l.* against Quakers only under the powers of 7 & 8 Will. 3, c. 34; and 53 Geo. 3, c. 127, in England; and in Ireland under the 7 Geo. 3, c. 21, and 54 Geo. 3, c. 68, except where the actual title shall be *bonâ fide* in question.

S. 2. In future, execution for non-payment of tithes to be had only against the property, and not against the persons of Quakers.

CAP. 75.—An Act for the Amendment of the Law as to the Tithing of Turnips in certain Cases.

[9th September, 1835.]

Turnips severed from, and consumed on the land, subject to payment of tithe, as if they had been consumed without having been so severed.

CAP. 76.—An Act to provide for the Regulation of Municipal Corporations in England and Wales.

[9th September, 1835.]

S. 1. repeals all laws, statutes, charters, and customs, inconsistent with this act.

S. 2. All rights of property and beneficial exemptions reserved to freemen, their wives and children, subject to payment of interest on debts, and to the salaries of municipal officers; but not to be exempt from tolls or dues levied for the benefit of any body corporate, unless such right of exemption was claimable on the 5th of June last; and not entitled to anything herein reserved, unless the claimants shall have first fulfilled every condition precedent to their being entitled to the benefits of such rights.

S. 3. No person to be admitted a burgess or freeman by gift or purchase.

S. 4. Parliamentary franchise under 2 Will. 4, c. 45, reserved to freemen.

S. 5. Town clerk to make out by the first of December next a list to be called "The Freemen's Roll," to which the names of all future freemen shall be added.

S. 6. Corporations to be styled mayor, aldermen, and burgesses.

S. 7. Boundaries of the boroughs named in the first section of the schedules (A.) and (B.) to be those settled by 2 & 3 Will. 4, c. 64; those in the second section to remain until altered by parliament: but detached places not to be included in boroughs.

S. 8. Every place within the bounds of a borough to be a part of it, and parts detached to form part of adjoining county: where such detached parts are now liable to any rate for payment of a debt due by the borough or council, in case of difference the senior judge of assize may appoint a barrister to adjust the proportions; gaols, asylums, and courts of justice, to continue to belong to the same places as heretofore.

S. 9. Occupiers of houses and shops rated to the relief of the poor for three years, and residing within seven miles, entitled to be inrolled as burgesses; aliens, and persons who have within twelve months received parochial relief, not to be enrolled.

S. 10. Medical assistance given by charitable trustees, or instruction of children in endowed schools, not to be a cause of disqualification.

S. 11. Occupiers of houses and shops may claim to be rated; but landlords not thereby to be discharged from their existing liability in default of payment by the tenants.

S. 12. Where houses came to any person by descent, marriage, devise, or offices, he may reckon the occupancy and rating of his predecessor.

S. 13. No new burgesses to be admitted who are not qualified by occupancy and rating under this act.

S. 14. All exclusive rights of trading in cities and boroughs abolished.

S. 15. Overseers to make out lists of all persons entitled to be burgesses in their respective parishes on the fifth of September in every year, to be delivered to the town clerk, who shall cause lists to be printed and sold, and fixed in some public place during the week preceding the 15th of September.

S. 16. If there is no town clerk, his duties to be performed by a person to be appointed by the mayor: in precincts where there are no overseers, the overseers of the adjoining parish shall insert the names of persons in such precincts in their own list.

S. 17. Persons omitted from such lists to give notice to the town clerk; notice to be given to the town clerk, and to the persons themselves, of persons objected to; and lists of claimants and persons objected to, to be published.

S. 18. The mayor and two assessors to revise burgess lists between the first and fifteenth of October, and on due proof to insert and expunge names.

S. 19. Mayor may adjourn the court, require the production of rate-books, and administer oaths; mayor and assessors to determine on claims and objections in open court, and the former to sign every page of the settled lists.

S. 20. The senior judge of assize to appoint barristers to revise the lists in the first year instead of the mayor and assessors.

S. 21. Affirmation may be made instead of oath in the usual cases.

S. 22. Revised burgess lists to be kept by the town clerk, and by him made into one general alphabetical list, with the names numbered; the book containing such list to be the roll of burgesses entitled to vote in the choice of councillors, assessors, and auditors.

S. 23. Town clerk to have the burgess roll printed for sale.

S. 24. The Council of every borough to order the treasurer to pay the expenses of overseers in making the lists.

S. 25. Mayor, aldermen, and councillors, to be chosen in every borough, and to constitute and be called "The Council." The number of councillors to be as specified in schedules (A.) and (B.); aldermen to be one-third the number of councillors; on the 9th of November in this year the councillors first to be elected, and in every third succeeding year the council for the time being to elect from the councillors, or other qualified persons, the aldermen, or so many as shall be required to fill up vacancies; and on the 9th November 1838, and in every third succeeding year, one-half of the aldermen to go out of office in rotation; but aldermen so going out of office, may, if qualified, be re-elected, but may not vote in the election of new aldermen.

S. 26. Mayor and aldermen to continue to be members of the council during their offices, notwithstanding the provisions hereinafter contained for the retirement of councillors at the end of three years.

S. 27. In case of an extraordinary vacancy in the office of aldermen, the council within ten days to elect a successor, who is to go out of office when his predecessor would have done, but may be re-elected.

S. 28. Clergymen or dissenting ministers not qualified to be chosen councillors or aldermen; nor persons not entitled to be on the burgess list, nor unless qualified as follows; in boroughs divided into four or more wards, having in real or personal estate 1000*l.*, or rated at not less than 30*l.*; in boroughs divided into less than four wards, having 500*l.*, or rated at 15*l.*; nor persons holding places of profit in the gift of the borough, or having any contract with such council; but persons not to be disqualified by being a shareholder in any company contracting with the council for lighting or supplying with water or insuring from fire any part of the borough.

S. 29. Burgesses enrolled on the burgess roll, and no others, to vote in the election of councillors, auditors, and assessors.

S. 30. Burgesses to elect councillors, or so many as shall be needed to fill up vacancies, on the 1st of November in every year.

S. 31. One-third part of the council to go out of office on the first of November in every year; in 1836, those elected by the smallest number of votes; in 1837, those elected with the next smallest number of votes; and afterwards, those who have been longest in office without re-election; but councillors so going out of office, may, if qualified, be forthwith re-elected.

S. 32. Election of councillors to be held before the mayor and assessors; the voting to commence at nine in the morning, and to close at four in the afternoon; burgesses to vote by delivering to the presiding officer a list of names not exceeding the number of vacancies, with the places of abode and descriptions of the persons for whom they vote, and signed by the voters, with their own address and qualification.

S. 33. The mayor may have booths or rooms provided for taking the votes in different parts of the borough.

S. 34. Voter may be asked only, whether he is the person who signed the voting-paper; whether he is the person enrolled as a burgess under the particular description; and whether he has voted before at the same election? Person making a false answer guilty of a misdemeanor.

S. 35. Mayor and assessors to examine the voting papers, and declare those to be elected who have most votes; and in case of equality of votes, to name from among those having equal votes as many as are requisite to complete the number to be chosen; voting papers to be kept at the town clerk's office for six months after the election, and to be open for inspection on payment of 1s.; list of persons elected to be published within two days after the election.

S. 36. In case the mayor is dead or incapable of acting, the council to choose an alderman to preside at elections.

S. 37. On the first of March in every year the burgesses to elect from persons qualified to be councillors, two burgesses to be called auditors, and two to be called assessors, to continue in office for one year; no burgess to vote for more than one auditor or assessor; and a councillor, the town clerk, and treasurer, to be ineligible as auditor or assessor.

S. 38. On the first election of councillors under this act, existing mayors, aldermen, and common councilmen, to go out of office, but to be eligible under this act; persons being justices of the peace in any borough, to continue to act until May 1st 1836; in boroughs where any election would have taken place between the day of passing this act, and May 1st 1836, no such election shall be holden, but the persons holding office at the passing of this act shall continue to do so.

S. 39. Where boroughs are to be divided into wards, the bounds of the wards are to be determined by the barristers appointed to revise the lists.

S. 40. Number of councillors for each ward to be assigned by the barristers, having respect to the number of persons rated to the poor, and the

aggregate amount of rates in each ward; provided that the number for each ward shall be divisible by three.

S. 41. Where it may be advisable to adhere to ancient divisions, barristers may divide boroughs in schedule (A.), where the number of wards is greater than two, into any number more or less by one than is mentioned in the schedule.

S. 42. Barrister may require the production of rate-books, and examine overseers and others on oath.

S. 43. Councillors and assessors to be elected in wards by the burgesses of such wards; election, except in case of the mayor's ward, to be held before an alderman and two assessors, to be partly chosen by the burgesses of each ward.

S. 44. Burgesses to vote in the ward in which the property for which they are rated is situate; but may not vote in more than one ward.

S. 45. Lists of burgesses in each ward, to be called "Ward Lists," to be made out yearly.

S. 46. Persons elected to be councillors or assessors in more than one ward to choose for which ward they will serve.

S. 47. Extraordinary vacancies of councillor, auditor, or assessor, to be filled up by fresh election within ten days; but not, in case of councillors, unless the number remaining shall not exceed two-thirds of the whole number.

S. 48. Mayor, aldermen, or assessors respectively, refusing to revise the burgess list, or to conduct elections, to forfeit 100*l.*; overseers neglecting to make out lists, or town clerk to receive and print lists, to forfeit 50*l.*, to be sued for in one of the superior courts within three months; one moiety of the penalty to go to the party suing, the other to the borough fund.

S. 49. Council to elect the mayor on November 9th in every year, out of the aldermen and councillors; in case of extraordinary vacancy a new election to be made within ten days.

S. 50. Mayor, aldermen, councillors, auditors, and assessors, not to act until they have made a declaration of acceptance of office; aldermen, if required by two councillors, to make a declaration of qualification once in three years.

S. 51. Every qualified burgess elected to the office of alderman, councillor, auditor, or assessor, and every councillor elected to the office of mayor, to accept the office or pay a fine, in the former cases not exceeding 50*l.*, in the latter 100*l.*, to be fixed by a by-law to be made by the council; such fine to be levied under a justice's warrant, by distress and sale of goods. Persons under any permanent infirmity, or above 65 years of age, or who have already served, or have paid the fine within five years, exempt; as also military and naval officers on full pay.

S. 52. Any mayor, aldermen, or councillor, being declared bankrupt or insolvent, or absenting himself from the borough, for two months, if mayor, or for six months, if an alderman or councillor, except in case of illness, shall lose his office, and in case of absence, forfeit the penalty for non-acceptance of office.



S. 53. Persons acting as mayor, aldermen, councillors, auditors, or assessors, without having made the declaration required by s. 50, or without being qualified, to forfeit 50*l.*, recoverable by action within three months; proof of qualification to lie on defendant; plaintiff may be required to give security for costs; such action only to be brought by a burgess; one-half of the penalty to go to the plaintiff, the other to the borough; but all official acts done by such disqualified person to be valid.

S. 54. Persons guilty of bribery to forfeit 50*l.*, recoverable by action, and on conviction to be disqualified from voting at any election in the borough.

S. 55. Persons offending in any of the cases aforesaid discovering others offending, and causing their conviction, to be discharged from all penalties and disabilities.

S. 56. No person liable to incapacity, penalty, forfeiture, or penalty, unless prosecuted within two years.

S. 57. The mayor to be a justice of the peace for the borough, and returning officer at elections of members of parliament; in case of his death or absence, the council to elect one of the aldermen to be returning officer.

S. 58. Council, on the 7th of November in this year, to appoint a town clerk, to hold office during pleasure; and a treasurer and other officers, and may take security for the due discharge of their official duties, and may direct salaries to be paid, and fill up vacancies, as they occur: the town-clerk and treasurer not to be the same person.

S. 59. Treasurer not to pay any money but by order of council, or court of sessions, or justice of the peace, acting judicially, except in cases provided by this Act.

S. 60. Town-clerk, treasurer, and other officers, to give accounts according to the orders of the council; on their refusing to do so, one justice may by warrant direct them to be brought before two justices, who may determine the matter, direct payment of monies due, and in default issue warrant of distress, and if there are not sufficient goods to distrain upon, or if books are withheld, may commit the offender till he has paid the money or complied with the order; but no person to remain in prison for want of sufficient distress longer than three months; this Act not to abridge any remedy by action against an officer or his surety.

S. 61. Councils of cities and towns, being counties, to appoint a sheriff on the 1st of November in every year.

S. 62. In boroughs, having a court of quarter sessions, the council to appoint a coroner within ten days after the grant of such court.

S. 63. Coroners to make returns to a secretary of state on the 1st of February in every year.

S. 64. In other boroughs the county coroners to act.

S. 65. The council, at the first election, may remove bailiffs, treasurers, or chamberlains, and other ministerial and executive officers; such officers to continue in office until removed.

S. 66. Officers removed to receive compensation, to be assessed by the council, and to make a statement of their claims; the officer removed, or

one-third of the council, not satisfied with the amount of compensation, may appeal to the commissioners of the Treasury.

S. 67. Compensation to be secured by bond under the common seal.

S. 68. Reservation of certain pensions and allowances to retired officers, their widows or children, ministers of churches, masters of schools or charitable institutions, granted prior to June 5, 1835, or customarily paid for the last seven years.

S. 69. All acts of the council to be decided by a majority of councillors present, one-third of the whole number to be a quorum; the mayor, or alderman, or, in their absence, the councillor presiding, to have the casting vote; minutes to be taken, and signed by the president; meetings to be called by three days' public notice, to be signed by the mayor, or, on his refusal, by five members of the council: four quarterly meetings to be held, of which no notice need be given, one on the 9th of November, the others on days to be at that meeting appointed; the first business in the November meeting to be the election of the mayor.

S. 70. Council may appoint committees either of a general or special nature; the acts of such committees to be submitted to the council for their approval.

S. 71. Where bodies corporate are trustees to charitable estates, their rights shall continue in the persons who are now trustees, until August 1, 1836, and shall then cease. In case of a vacancy within that time the lord-chancellor may supply it; and in case parliament shall not otherwise direct, the lord-chancellor may make such orders as he shall think fit for the administration of such trust-estates.

S. 72. Council to act as trustees (except in cases of charitable trusts) where the corporators were ex officio sole trustees.

S. 73. Where the body corporate, or a particular number or class appointed by the body corporate, were trustees jointly with others, or by themselves, the council, where it was not inconsistent with the provisions of this Act, may appoint the like number of councillors to be trustees in their stead, and may fill up vacancies as they occur.

S. 74. Members, or nominees of a body corporate, who were trustees for a limited period, to continue trustees for such period; if for an indefinite time, then until January 1, 1836; in case any particular member of a body corporate has been appointed trustee by act of parliament, deed, or will, for a definite period, he shall continue to act until the determination of such period; or if for an indefinite time, then until January 1, 1836.

S. 75. Powers vested in trustees under statutes for paving, lighting, watching, and supplying with water certain boroughs, may be transferred to the council.

S. 76. A watch committee to be appointed, to consist of the mayor and a sufficient number of councilmen; such committee to appoint constables for the borough, who shall be constables for the county also, and for every county within seven miles of any part of the borough.

S. 77. Watch committee to make regulations for the conduct and discipline of the constables.

S. 78. Any constable may apprehend disorderly persons, and persons suspected of felony, and deliver them to borough constables.

S. 79. Constables appointed under this Act, attending at the watch-houses during the night, may take bail by recognizance from persons charged with petty misdemeanors, such recognizance to be conditioned for the appearance of the parties before a magistrate within two days; in default of appearance, record of the recognizance to be returned to the sessions, and to be forfeited; but the time for hearing may be postponed on application, and the recognizance enlarged.

S. 80. Constables convicted before two justices of neglect of duty to be imprisoned not exceeding ten days, or fined not exceeding 40s., or dismissed from office.

S. 81. Persons assaulting constables to forfeit not exceeding 5*l*.

S. 82. Watch committee, subject to the approbation of the council, to regulate the payment of constables' expenses, and rewards for their activity.

S. 83. Two justices to appoint, annually, persons to act as special constables, who are to be paid 3*s*. 6*d*. each, for every day when called out.

S. 84. Public notice of appointment of constables to be given; and then the provisions of local acts as to watching to cease: watch-boxes, arms, &c. to be given up for the use of constables appointed under this Act: rates for purposes other than watching, levied under former acts, to continue.

S. 85. Rates in arrear for watching to be collected; and rates for payment of debts or interest to be levied as heretofore.

S. 86. Watch committee to report quarterly to the secretary of state, and to transmit a copy of their rules.

S. 87. Council may order parts of a borough not within a local act as to lighting to be included in such act; such parts to be lighted as the rest, and the rate not to exceed the average proportion of the lighting the other parts of the borough.

S. 88. Council may take upon themselves the powers of inspectors under 3 & 4 Will. 4, c. 90, for lighting any part of a borough not within a local act as to lighting.

S. 89. This Act not to interfere with regulations for the government of dock-yards, arsenals, and barracks.

S. 90. The council to have power to make by-laws, which may be disallowed by the king in council.

S. 91. Provisions in this Act, as to offences punishable on summary conviction, to apply to offences against by-laws.

S. 92. Proceeds of all corporate property, and all fines received, to be carried to the account of the borough fund; such fund to be applied in payment of debts, officers' salaries, and election expenses; surplus, for the public benefit of the inhabitants and improvement of the borough; if the fund is insufficient, the council may order a borough rate to be levied to make up the deficiency.

S. 93. Treasurer to keep accounts of receipts and disbursements, to be audited twice in the year, and published in September in every year.

S. 94. Council not to sell or lease lands for more than 31 years, such leases to be at a rack-rent, except with the approbation of the commissioners of the Treasury.

S. 95. But the council may renew leases for lives or years, in pursuance of any agreement or ancient usage.

S. 96. And may lease buildings, or ground for building on, or for making gardens for 75 years.

S. 97. Council may proceed to set aside collusive purchases, sales, and demises of corporate property, made since June 5, 1835, for undue consideration.

S. 98. The king may issue a commission for the appointment of justices in boroughs.

S. 99. Council may make a by-law fixing the salary of police magistrates, whereupon the king may appoint such magistrates.

S. 100. Council to provide police offices.

S. 101. Justices assigned for boroughs need not be qualified by estate to have jurisdiction throughout the county, and within seven miles of the borough; but not to sit in courts of gaol delivery or quarter sessions.

S. 102. Justices to appoint a clerk, who shall not be an alderman, councillor, or clerk of the peace, nor be employed in the prosecution of offenders committed by the borough justices, under a penalty of 100*l*.

S. 103. The king, on petition, may grant a separate court of quarter-sessions, and appoint a recorder; the council to appoint a clerk of the peace; recorder to be a justice of the peace for the borough, but not a member of parliament for the borough, alderman, councillor, or police magistrate, but may be a revising barrister; present recorders, being barristers of five years' standing, to be continued; recorders, in case of illness or absence, may appoint deputies.

S. 104. Recorder and justices to make declaration before acting.

S. 105. Sessions of the peace to be held for the borough, of which the recorder is to be the sole judge; but not to levy county rates, or grant licences, or exercise powers specially vested in the council.

S. 106. In the absence of the recorder or his deputy, the mayor may open and adjourn the court, but not sit as judge.

S. 107. Capital and other criminal jurisdictions, other than are specified in this Act, abolished after May 1, 1836.

S. 108. Chartered admiralty jurisdictions in boroughs abolished; but this Act not to affect the jurisdiction of the lord warden as admiral of the Cinque Ports.

S. 109. Certain cities excepted out of the operation of 38 Geo. 3, c. 52, repealed; and offences committed within counties of cities or towns corporate shall be tried under that act until the king shall issue a commission of oyer and terminer, and gaol delivery.

S. 110. After May 1, 1836, persons committed to borough sessions whose jurisdiction is taken away, to be tried in the adjoining county.

S. 111. County justices to have jurisdiction in boroughs which have not a separate court of quarter sessions under this Act.

S. 112. After the grant of a separate court of quarter sessions in any borough, such borough not to be assessed to county rates.

S. 113. Sums directed to be paid by 7 Geo. 3, c. 64, in respect of felonies and misdemeanors committed in boroughs having separate courts of quarter sessions, to be paid out of the borough fund.

S. 114. Treasurers of counties to keep an account of expenses of the prosecution of offenders sent by boroughs, having separate courts, for trial at the assizes, and to make order on them for the payment. In case of difference respecting such account, the same to be referred to arbitration, under the provisions of 5 Geo. 4, c. 85. But this Act not to alter the powers of justices in contracting for the maintenance of prisoners committed from boroughs, save only that after May 1, 1836, such powers shall be vested in the borough councils only.

S. 115. Council of boroughs having gaols fit for the confinement of prisoners may contract for the committal of prisoners from other boroughs; and if they shall have separate courts granted them, may try such offenders accordingly.

S. 116. Council of boroughs named in schedule (A) of 5 Geo. 4, c. 85, to have the same powers under 4 Geo. 4, c. 64, and 5 Geo. 4, c. 85, as justices of the peace have at their sessions in counties.

S. 117. Boroughs which, before this act, were liable to pay a proportion of the general county expenditure, still to pay it: in case of difference, the same to be referred to arbitration under the provisions of 5 Geo. 4, c. 85.

S. 118. Borough courts of record for the trial of civil actions, to be holden as heretofore: where the judge is a barrister of five years standing, such courts may try actions on contract, trespass, trover, and ejectments, where the sum sought to be recovered does not exceed 20*l.*: such judge may make court rules to be allowed by three judges of the superior courts; but may not try actions where title to lands, or franchises, shall be in question.

S. 119. Council to appoint a registrar and other necessary officers in such courts, who may not practise as attorneys therein.

S. 120. Suits commenced before May 1, 1836, not to abate by reason of the change of jurisdiction.

S. 121. All burgesses (not otherwise disqualified by 6 Geo. 4, c. 50,) to be jurors in borough courts: clerk of the peace to summon grand jurors, and not less than thirty-six jurors, who are liable to be fined by the court for non-attendance.

S. 122. Members of council, justices, treasurer, and town clerk, exempt from serving on borough or county juries: burgesses of boroughs having a separate court of quarter sessions, exempt from serving on juries at county quarter sessions.

S. 123. All chartered exemptions from serving on juries abolished.

S. 124. Council to make tables of fees, (to be confirmed by the secretary of state,) payable to the clerk of the peace, clerk to the magistrates, and registrar and officers of the court of record.

S. 125. Table of fees to be hung up.

S. 126. Penalties recoverable on summary conviction, except when payable to the informer, to go to the borough fund.

S. 127. Offences punishable on summary conviction to be prosecuted within three months.

S. 128. Borough justices may summon witnesses, who, on disobedience, may be fined not exceeding 5*l*. No witness or justice to be incompetent on the ground of his being rateable to the borough.

S. 129. Justices may direct penalties to be paid immediately, or within a limited period; and in default of payment, the sum may be levied by distress, or the offender imprisoned for not more than one month, if the sum does not exceed 5*l*., or in any other case for two months.

S. 130. gives a form of conviction.

S. 131. Parties, on summary conviction under this act, may appeal to the next court of quarter sessions, entering into recognizances for the prosecution of the appeal, and for abiding the judgment of the court.

S. 132. No conviction, order, or warrant made under this act, to be quashed for want of form, or removed by certiorari: nor distress to be deemed unlawful for want of form in the summons, conviction, or warrant of distress.

S. 133. Proceedings against persons acting under this act, to be brought in the same county, and commenced within six months; one month's notice of action to be given: defendant may plead the general issue, and tender amends.

S. 134, 135, reserves the jurisdiction of the cinque ports.

S. 136. This act not to affect letters-patent founding a grammar school at Louth.

S. 137. Not to affect the rights and privileges of the Universities of Oxford and Cambridge.

S. 138. Nor jurisdictions over precincts of cathedrals, nor rights of the University of Durham.

S. 139. Where bodies corporate are seised in their corporate capacity of advowsons, or right of presentation to any ecclesiastical preferment, such rights may be sold as the ecclesiastical commissioners shall direct: vacancies before sale to be supplied by the bishop of the diocese.

S. 140. The periods connected with the first registration of burgesses, and election of councillors, &c. may be deferred by order of the king in council. [They have been deferred accordingly.]

S. 141. The king may grant charters of incorporation.

S. 142. Interpretation of certain words and expressions used in this act.

CAP. 77.—An Act to repeal the Duty and Drawback on Flint Glass, to impose other Duties and another Drawback in lieu thereof, and to reduce the Drawback on German Sheet Glass exported in Panes; and to repeal the Drawback on unground and unpolished Plate Glass; and to amend the Laws relating to the Duties on Glass. [9th September, 1835.]

CAP. 78.—An Act to explain and amend an Act passed in the second and third year of the reign of King William the Fourth, for amending the Representation of the People in Scotland; and to diminish the Expenses there. [9th September, 1835.]

**CAP. 79.**—An Act to suspend, until after the sixth day of April, 1836, Proceedings for recovering Payment of certain Instalments of the Money advanced under the Acts for establishing Tithe Compositions in Ireland.

[9th September, 1835.]

**CAP. 80.**—An Act to apply a Sum of Money out of the Consolidated Fund, and Surplus of Ways and Means, to the Service of the year 1835, and to appropriate the Supplies granted in this Session of Parliament.

[10th September, 1835.]

**CAP. 81.**—An Act for abolishing capital Punishment in cases of Letter-stealing and sacrilege.

[10th September, 1835.]

So much of the Acts 36 Geo. 3 (Ireland); 52 Geo. 3, c. 143; 7 & 8 Geo. 4, c. 29, and 9 Geo. 4, c. 55, as inflicts the punishment of death for letter stealing, and sacrilege, repealed; and persons convicted thereof, or of aiding or abetting therein, to be transported for life, or for not less than seven years, or be imprisoned for not more than four years.

**CAP. 82.**—An Act to abolish certain Offices connected with Fines and Recoveries, and the Cursitors in the Court of Chancery, and to make Provision for the Abolition of certain Offices in the Superior Courts of Common Law in England.

[10th September, 1835.]

S. 1. abolishes certain offices in the Court of Common Pleas, and Alienation Office.

S. 2. Records and books belonging to the said offices to be transferred to the registrar in London, under 3 & 4 Will. 4, c. 74, subject to the orders of the Court of Common Pleas.

S. 3. The business of the offices abolished, transferred to the registrar, subject to the provisions of 3 & 4 Will. 4, c. 74.

S. 4. After transfer of business, searches may be made, and copies of records taken, which shall be available as heretofore.

S. 5. Fines now payable on alienation of lands, in the alienation offices, to be paid to the said registrar, and accounted for by him.

S. 6. Same fees to be paid as heretofore, and the Treasury to fix the remuneration of registrar for the duties hereby imposed on him.

S. 10. Cursitors of the Court of Chancery abolished from after December 31, 1835, and their duties transferred to the Petty Bag Office.

S. 11. Records and books of the cursitors to be transferred to the clerks of the Petty Bag Office.

S. 12. Clerks of the Petty Bag Office to receive the same fees as the cursitors; and the Treasury to fix the salary for duties hereby imposed on such clerks.

**CAP. 83.**—An Act to amend the Law touching Letters-patent for Inventions.

[10th September, 1835.]

S. 1. Any person having obtained letters-patent for any invention may enter a disclaimer of any part of his specification, or a memorandum of any alteration therein; such disclaimer or memorandum, when filed, to be deemed part of the specification; but any person may enter a caveat against such disclaimer or alteration; no such disclaimer or alteration to affect actions pending at the time; the attorney-general may require the party to advertise his disclaimer or alteration.

S. 2. Where a patentee is proved not to be the real inventor, he may petition the king in council to confirm the letters-patent, or to grant new letters; and the judicial committee being satisfied that he believed himself to be the original inventor, may recommend that his petition be granted; but any person opposing the petition may be heard before the judicial committee.

S. 3. If in any action or suit a verdict or decree shall pass for the patentee on the merits of the suit, the judge may grant a certificate, which being given in evidence in any other suit, shall entitle the patentee, on a verdict in his favour, to receive treble costs.

S. 4. Patentee may petition for the prolongation of the term of his patent, and the judicial committee of the privy council having heard him and persons who have entered caveats, may recommend a further extension of the term, not exceeding seven years.

S. 5. In case of action for infringing letters-patent, the defendant shall give the plaintiff, and in a *scire facias* to repeal letters-patent the plaintiff shall file with his declaration, a notice of objections to be given; but a judge at chambers may give leave to offer other objections.

S. 6. In actions for infringing letters-patent, judge to award the costs of each part of the case according as either party has succeeded, without regard to the general result of the trial.

S. 7. Any person using the name or mark of a patentee without authority, to forfeit 50*l.*, recoverable by action; one half thereof to go to the Crown, the other to the party suing.

CAP. 84.—An Act to empower Grand Juries in Ireland to raise Money by Presentment for the Construction, Enlargement, or Repairs of Piers and Quays.  
[10th September, 1835.]



## EVENTS OF THE QUARTER.

AFTER all the formidable threatenings of the last Session, it is some relief to find that very little has been done under the name of legal reform but what the most cautious may approve; and that all the most important measures of doubtful expediency have been rejected or stand over. Amongst the measures which stand over are the Attorney-General's Imprisonment for Debt Bill (passed by the Commons in apparent ignorance of its actual character), Mr. Ewart's Prisoners' Counsel Bill, and the Bills for altering the Law of Wills and Executors. Lord Abinger, than whom no one can be more competent to form an opinion of them, is reported to have been the principal objector, in their present state, to the last. The Local Court scheme can hardly be said to stand over, as it has not been brought forward at all. The General Registry Bill must be regarded as absolutely defunct. The most remarkable amongst the notices of motions for next Session is Mr. Ewart's for the introduction of Partibility in Descents.

Under the authority of the Prison Regulation Act (comprised in our Abstract of Statutes), five inspectors have been appointed at salaries of seven hundred a year each, exclusive of expenses. Considering how much care and circumspection have been employed of late years in the selection of governors with their subordinates—considering also that the gaols are under the constant and active supervision of the magistrates—we are utterly at a loss to know how these five inspectors will manage to find employment after the first year or two; unless it is intended that they shall take up their residence in the gaols, changing about occasionally as personal convenience may require. The Poor Law Commissioners, who have from ten to twelve thousand parishes to watch over and communicate with, are only appointed for five years certain.

The First Annual Report of the Poor Law Commissioners has recently appeared. It is an ably drawn and very valuable document, offering ample evidence of the beneficial tendency of the change as regards the public; though, in a professional point of view, we fear we shall find little reason to rejoice in it. The Sessions business as to Appeals has been greatly diminished by the operation of the new law, or rather by the general adoption of the workhouse system of relief under the new law. Paupers are commonly sent to the workhouse for twenty-one days previous to their removal. The workhouse discipline, together with the uncertainty as to the sort of parish to which they may under the new system be sent, materially reduce the proportion of removals. In one magistrate's office where there were formerly forty removals in a month, there are now not above four or five. Of course the proportion of appeals must be diminished in proportion to the diminution of removals; independently of the diminution arising from the rule that notice shall be given of all the facts upon which an appeal is made. But to compensate for

this loss of business from appeals at the sessions, the cases of orders of affiliation are progressively increasing. It appears from official returns, that there were at the Michaelmas Sessions, 1834, forty-six cases; whilst during the present year there have been at the Epiphany Sessions, 298; at the Easter Sessions, 460; at the Midsummer Sessions, 523; which shows a goodly progression of business. The commissioners, however, in their Report strongly advocate the entire repeal of all the statutory remedies against the father in cases of bastardy; contending that the mother in the case of destitution should be placed on the same footing as a widow having a child which she is unable to maintain. From the returns it appears that the total number of cases affiliated during the last year was 1331. No doubt a large proportion of fathers escaped without pursuit at the Sessions; many were not thought worth the expense of proceedings, and against others the requisite evidence could not be obtained. But if we may estimate the reduction by the number of bastards born in the year 1830, which was computed by the clergy at 20,039 for the whole kingdom, the effect of the alteration in reducing this class of parochial burdens is greatly beyond what was anticipated. In answering the ordinary objections to the repeal of the present law of bastardy, the Commissioners very properly object to converting the laws intended exclusively for the relief of indigence into an instrument for punishing seduction as a crime; but they have thought proper to clog their argument with a suggestion against which we take the liberty to protest:—"It appears to be commonly overlooked in the complaints on this subject, that for the injury of seduction the Courts of Law afford a remedy; and to any objection that might be made that this remedy is too costly, or is otherwise out of the reach of the poor, we submit that the proper remedial course of legislation would be to render justice, dispensed by proper judicial functionaries, accessible to the poorest classes of the community." The privilege of bringing actions for their wives and daughters has generally been regarded as productive of no very high advantages to the rich, and this is certainly the first grave suggestion we ever heard for extending that privilege to the poor.

As the revising barristers have again become the object of general attack, we beg leave to repeat our former remark, that the reports of their decisions, given in the country newspapers, are very seldom indeed to be depended upon. We have been at the pains of examining several alleged instances of inconsistency, and have almost always found them destitute of any solid foundation. We would be understood, however, as excepting from this remark decisions on those clauses of the Reform Act which have been from the commencement an avowed subject of difference; which, consequently, it was the bounden duty of the government to interpret, the more particularly as two periods of revision have now elapsed since returns of doubtful questions were collected from the revising barristers with a view to a declaratory act. It is also undeniable that the chances of inconsistency have been greatly increased by the judges, who are in the habit of appointing about twice as many barristers as are really necessary for the work, even with the present limit as to time, which probably it will hereafter be found advisable to extend. We also earnestly recommend an extension of the time for the revision of the burgess lists under the Municipal Corporation Act, which must be completed between the first and fifteenth of December, thus (excluding Sundays) allowing only thirteen days for the work.

We are convinced that the revision cannot be satisfactorily completed within the time, for though the number of barristers may be increased *ad libitum*, overseers and rate-books can only be present in one Court at a time. In each case of claim or objection it may be necessary for the barrister to inspect all the rates made from January 1, 1833, to August 31, 1835, and examine the overseers relating to them. Now there are numerous parishes containing many thousand inhabitants, and it is not unusual to find eight or ten rates in a year.

The Court of Chancery still continues a monument of the insufficiency of the Whig-Radical party. Lord Brougham is too fickle, Mr. Bickersteth too honest, and Sir John Campbell, with all his cleverness, does not seem to strike any one as precisely the sort of person for a chancellor. Things will probably remain *in statu quo* till the next session of parliament, when the division of the great seal is to be proposed.

Towards the conclusion of the last session an awkward difference arose between Lord Lyndhurst and Lord Denman, to which the peculiar nature of the subject compels us to allude. In the course of the debates on the Municipal Corporation Act, Lord Lyndhurst had taken occasion to pass in review the names of the Commissioners, with the simple addition of *Whig* or *more than Whig* to each. His sole and avowed object was to show the spirit in which the commission had been issued; and for any thing contained in his speech to the contrary, the Commissioners might one and all have been possessed of every human virtue, with the single exception (if it be one) of a perfect freedom from bias to any side or party in politics. Misinformed as to the real and very limited purpose of the recapitulation—hearing only that some of his own personal friends had been invidiously particularized, and apparently believing that the character of the profession (of which he is undoubtedly one of the most distinguished ornaments and may be regarded in some sort as the natural defender) was involved, Lord Denman hurries up to town from the circuit, and throws himself, with all his wonted generosity but with much less than his usual discretion, into the affray; repels imputations which nobody had dreamed of casting, and unguardedly retorts, that Lord Lyndhurst should be the last man to employ the designation of *Whig* or *more than Whig* as a reproach, as the time had been when the strongest of these expressions was strictly applicable to himself. Lord Lyndhurst's answer was decisive—that he had never applied those terms in the sense which Lord Denman attributed to them, and that, whatever vague impressions some of his early associates might have conceived of his opinions, he had steadily adhered to one set of principles from his first entrance into public life till then. We give Lord Denman credit for the best and purest motives in this affair, but it is certainly very much to be regretted that he engaged in it, and we revive the recollection reluctantly; but we regard Lord Lyndhurst as emphatically the protector of the profession against the fellest of its foes, who on one trying emergency would most assuredly have swamped it but for him, and we are therefore more than ordinarily anxious to put on record his vindication from charges which may otherwise be reproduced with the view of undermining his claims to the gratitude and confidence of the bar.

Two or three desperate attempts have been made in the *Globe Newspaper* to attract attention to an article on Law Reform, which first appeared in the third

number of the London Review, and has just been reprinted as a pamphlet under the title of "Principles of Law Reform." The article contains thirty pages of quotation and twenty pages of writing pretending to be original. The part pretending to be original is neither more nor less than a *rechauffée* of Mr. Mill's paper on Jurisprudence in the Encyclopædia Britannica, a composition manifesting the most extraordinary unacquaintance with the subject-matter. Mr. Mill probably knew, and knows, pretty nearly as much about law, as the old schoolmen knew about the physical sciences, and labours much in the same manner to compensate for or conceal the extreme poverty of his materials by a pompous parade of logical forms, which any one, who thought it worth his while, might beat down as easily as Nicole beats down the scientific defences of Monsieur Jourdain in the play. The diction, the dogmatism, the allusions to Indian matters, the sneer at Mackintosh, all mark out Mr. Mill as the hasher-up of his own *repetita crambe* in the Review. A short characteristic passage is subjoined :—

"It is necessary here to obviate a blunder, or a misrepresentation, which, though very stupid, is very common. When we speak of expressing the law better, we mean nothing else. *We mean not to alter the law in a tittle.* We mean to improve the expression, to make that clear which is now obscure, that distinct which is now ambiguous, that orderly which is now a mass of disorder, that succinct which is now prolix to a degree altogether intolerable, and that easy to be known which is now almost beyond comprehension.

"But men have gotten it into their heads, that to make a code is to make new laws; that to make a code the existing laws are to be swept away, and a new set put in their place. With that belief they have a horror of codification; and if they were right in the belief we should most assuredly join with them in the horror. It would be to begin by destroying all rights that we might proceed to establish others, a project so pregnant with human misery that the most frightful of tyrants in their maddest fits never conceived anything which approached it.

"Rights are not touched by codification. Rights which are now ill expressed will by codification be well expressed, and that is the whole matter. *Every man's right* is then a better thing for him than it was before. The protection of it, which is that alone which gives it value, is better provided for. The good expression of rights is the first of the conditions on which perfect protection of them comes within the verge of possibility."

A little lower down he naively exclaims: "Good God! cannot we write the law over again? And have we not men among us who can marshal disordered ideas, and put every one of them in its proper place, with its proper expression? *That is all!*"

Now what can *he* know of law who talks in this manner? who proposes to write the whole law over again—making that clear which is now obscure—that distinct which is now ambiguous—professing all the time that he does not mean to alter the law in a tittle, and repudiating with holy horror the bare notion that the existing laws are to be swept away; who confounds the individual rights of persons with the general rules of right establishing or confirming them (the only rights, if they can be called rights, to be comprehended or expressed in any code or system of laws); who does not even see that the substitution of certainty for ambiguity

is a change ; and fancies that to codify the law of England nothing more is necessary than to write that law over again, much as a fastidious editor might write over again one of Mr. Mill's articles for a review. To complete the absurdity, he had just before contended that the law of England exists nowhere in a tangible, palpable, or intelligible shape. But we can furnish additional proofs of unfitness, which not even the most ardent of this gentleman's admirers can resist. He actually quotes sixteen pages from Lord Brougham's speech on Law Reform delivered in 1828, and six pages from the second Common Law Report, "to give an idea of the dreadful state we are in with respect to Courts, as matters are *at present* arranged, in the best governed country in the world." He might just as well quote one of Lord John Russell's speeches of the same date to give an idea of the dreadful state we are in with respect to parliamentary representation, as matters are at present arranged ; the constitution and procedure of the superior Courts at Westminster having undergone a complete remodelling upon the principles indicated by Lord Brougham and the Commissioners. In particular, the absurd fictions regarding jurisdiction are abolished, whilst the abuse of the general issue, the unnecessary multiplication of counts, and the unjust severity of the law of variance, to which the extracts from the Report of the Common Law Commissioners exclusively refer, have been effectively restrained. Now (to borrow this gentleman's favourite mode of arguing) either he did know of these changes, or he did not : if he did know of them, he is a glaringly dishonest writer ; if he did not, a culpably ignorant one.

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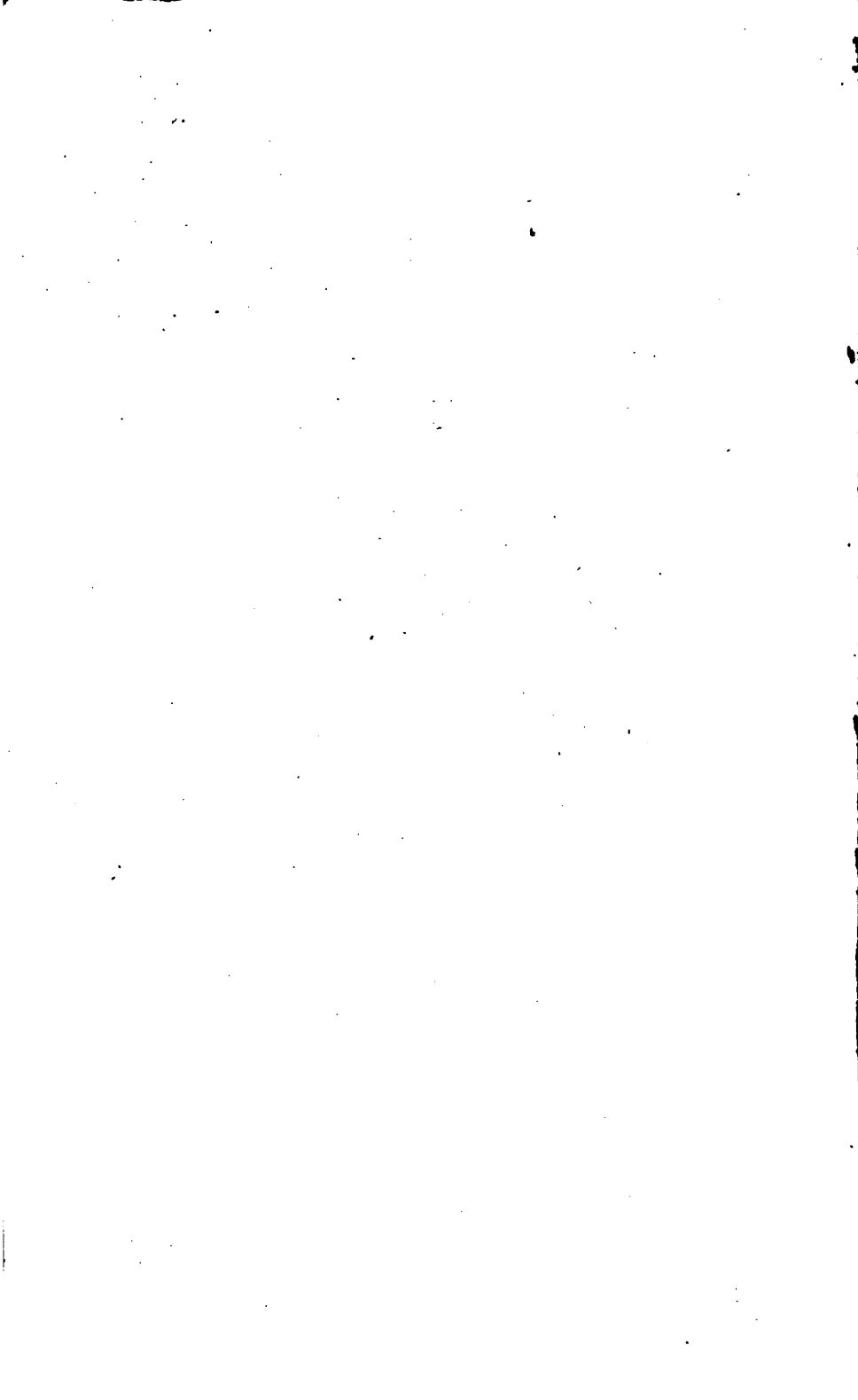
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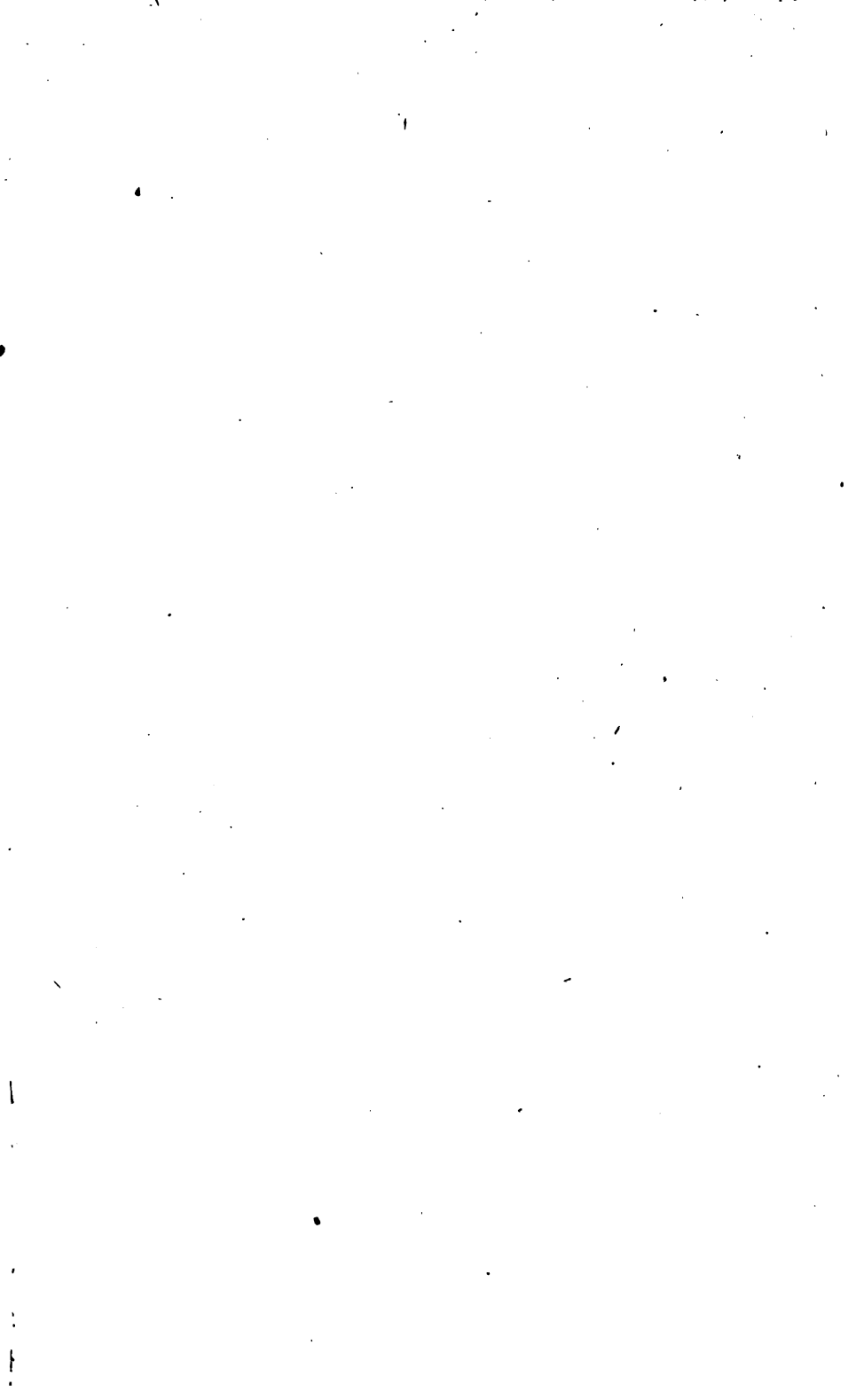
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